

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLIFFORD F. TUTTLE, ET AL. 4:21-CV-00270

VS. HOUSTON, TEXAS

CITY OF HOUSTON, ET AL. OCTOBER 29, 2024

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS
HEARD BEFORE THE HONORABLE ALBERT H. BENNETT
UNITED STATES DISTRICT JUDGE

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1 P R O C E E D I N G S

2 (Call to order of the court.)

3 THE COURT: Good morning. You may be seated.

4 Cause Number 4:21-cv-270, Tuttle, et al versus
09:59AM 5 City of Houston, et al.

6 Counsel, your appearances for the record.

7 MR. SMITH: Good morning, Your Honor. Boyd Smith for
8 the Tuttle plaintiffs.

9 MR. AVERY: Good morning, Your Honor. Jeff Avery for
09:59AM 10 the Nicholas plaintiffs.

11 MR. DOYLE: Mike Doyle here for the Nicholas family.

12 MR. DAWSON: Alistair Dawson for the City of Houston,
13 Your Honor.

14 MR. ODOM: Good morning, Your Honor. Al Odom for the
09:59AM 15 City of Houston.

16 THE COURT: Just a moment.

17 If your phone is on, make sure it's off.

18 MS. MARTIN: Good morning. Christy Martin for Gonzales
19 and Medina.

09:59AM 20 MS. AZADEH: Melissa Azadeh for Pardo, Lovings, and
21 Sepolio.

22 MR. GARCIA: Alexander Garcia for Thomas Wood and
23 Clemente Reyna.

24 MS. TAYLOR: Good morning. Michelle Taylor for Ashraf
09:59AM 25 and Salazar.

1 MR. DAY: Good morning, Judge. Dwayne Day here for
2 Gerald Goines.

3 MR. NACHTIGALL: David Nachtigall for Steven Bryant.

4 MR. HARDIN: Rusty Hardin for Felipe Gallegos.

10:00AM 5 THE COURT: Any other announcements?

6 (No response.)

7 THE COURT: Very well. Thank you, counsel, for
8 appearing for this status conference. I know it was on short
9 notice, and you're probably wondering what's this all about.

10:00AM 10 Well, obviously over the last several weeks there
11 have been some developments in not only this case but other
12 litigation concerning the subject matter of this case.

13 Obviously there was a criminal trial. I
14 understand -- and I'm going to get some more information on
10:00AM 15 this today -- that there were some reindictments and I wanted
16 to get an understanding how that might affect this litigation.

17 Also, the City has moved to bifurcate. That
18 motion is not yet ripe, but that may have an impact on how we
19 move forward.

10:01AM 20 And the plaintiffs had previously filed a motion
21 for partial summary judgment against certain defendants, which
22 is ripe; and I wanted to address perhaps why that came to be
23 and get that cleared up perhaps as well.

24 So let's start.

10:01AM 25 First, in regards to the reindictment of certain

1 defendants, the Court has not received any filings on this
2 matter; but obviously being an observer of the news, the Court
3 has become aware of that fact. The question is will it have an
4 impact on this case being tried?

10:01AM

5 I know that previously there were assertions of
6 the Fifth Amendment privilege. Part of that was that criminal
7 indictments or criminal cases were pending. And so now having
8 these defendants reindicted, will that, again, impact this
9 litigation?

10:02AM

10 So first, let me hear from those lawyers who
11 represent individuals who have been reindicted by the
12 Harris County district attorney.

13 MS. MARTIN: Sir --

10:02AM

14 THE COURT: Either speak into that mic or come up to
15 this microphone, either/or.

16 And, again, with the number of fine learned
17 counsel, please identify yourself again for the record.

18 MS. MARTIN: Christy Martin for Frank Medina to answer
19 this question.

10:02AM

20 So on Friday, we did file -- the people who
21 represent -- folks in the City Attorney's office who represent
22 defendants in the case filed a motion to seal the proceedings
23 because obviously the reindictments are -- if this matter is --

10:03AM

24 THE COURT: And I apologize. I've not seen your filing
25 from Friday. Could you explain. To seal what proceedings?

1 MS. MARTIN: The trial because --

2 THE COURT: You want the entire trial sealed?

3 MS. MARTIN: Yes. And that's because of the impact
4 that the reindictments are going to have.

10:03AM

5 So if the proceedings are public and it's highly
6 unusual for the civil case to proceed prior to the criminal
7 case and we already had the DA's office come here to try to get
8 depositions, they're obviously going to want testimony as well.

10:03AM

9 So that's -- you know, if we have district
10 attorneys sitting in the back listening to the stuff that's
11 developed in the civil procedure, that's going to seriously
12 prejudice the -- anybody who's been criminally indicted or is
13 under threat of criminal indictment because we've not yet heard
14 that the DA is done.

10:04AM

15 You know, at the end of the *Goines* trial, she did
16 make a statement to the news media that "We're going to
17 reindict you and you know who you are and I hope you hear me."

10:04AM

18 And so we have not yet heard whether this is the
19 end of it. So this is going to be a tremendous prejudice if
20 anybody who's subject to indictment or has been reindicted has
21 to go through the civil trial prior to the criminal cases being
22 resolved.

10:04AM

23 THE COURT: In regards to sealing -- and I'm not as
24 long in the tooth as some of you in this career -- but I cannot
25 recall an instance where an entire trial was sealed. And,

1 again, I'll obviously take a look at your filing to understand
2 the underpinning of your argument; but just as a matter of
3 first impression, sealing an entire trial seems problematic for
4 me.

10:05AM 5 MS. MARTIN: And I understand. And to be fair, this
6 motion is not yet ripe. It was just filed. There is no
7 response on file, so we're not asking the Court for a decision
8 on that today.

9 THE COURT: Absolutely. Thank you, counselor.

10:05AM 10 Anyone else representing a recently indicted
11 defendant in this case?

12 MS. AZADEH: Good morning, Your Honor. Melissa Azadeh
13 for defendants Pardo, Lovings and Sepolio.

14 I also represent recently reindicted defendants,
10:05AM 15 and I just wanted to elaborate a little bit on what Ms. Martin
16 said.

17 There is a little bit more of a problem because
18 of the *Garrity* information that is sort of interspersed
19 throughout the evidence that's been developed in this case and
10:06AM 20 most of the testimony will be tainted by the *Garrity* statements
21 either because it's an IAD investigator or questioning based on
22 evidence that is *Garrity*-protected that the plaintiffs
23 received.

24 And although we're trying to exclude that
10:06AM 25 evidence, I don't think it will be -- it could be split up and

1 we could have hearings to determine exactly what portions of
2 the testimony needs to be sealed, but it will be very difficult
3 to determine that. And I don't think that it's possible for
4 the defendants that are indicted to receive a fair criminal
10:06AM 5 proceeding if this information is released and accessible to
6 the public.

7 And by way of example, I did want -- the only
8 cases I found were either federal criminal cases that have been
9 sealed or to protect trade secrets, and those proceedings that
10:06AM 10 I found were sealed entirely.

11 THE COURT: Thank you, counselor.

12 MS. AZADEH: Thank you, Your Honor.

13 THE COURT: Anyone else from any of the defendants need
14 to be heard?

10:07AM 15 MR. HARDIN: Good morning, Your Honor. Rusty Hardin on
16 behalf of Mr. Gallegos.

17 We did not join in the motion to seal, and we
18 don't join it. From the very beginning we have wanted his
19 story and these guys that did have nothing to do with the
10:07AM 20 affidavit and were totally unaware of it, all we've wanted is a
21 public either a nonsuit in this case or his story to be out.

22 We have done it in the hopes the Court would
23 recognize qualified immunity applies to our man. That's why we
24 asked for a continuance until that decision was rendered by the
25 Court.

1 And, of course, if you rule against us, then
2 we're going to ask the Fifth Circuit for a stay. And then if
3 we're ruled beforehand, we're going to appeal, as you know, and
4 if we're not, then we're gone and we don't have an issue then.

10:08AM

5 I'll point out to the Court, you may not be
6 aware, we're the only one that waived our Fifth Amendment right
7 as long as the restriction of the deposition was not to go into
8 the issue that you're talking about now. That's our same
9 position for the trial.

10:08AM

10 We waive the Fifth Amendment that has anything to
11 do with the Harding Street case and we believe very strongly
12 not only was our guy -- is not liable, but that he's protected
13 by what he did. He's the guy that saved everybody's lives.
14 He's also the person that did the shooting. So he's the one
15 whose shots resulted in the deaths of the two deceased, but
16 he's also the one that did it while cloaked by qualified
17 immunity and saving four lives.

10:08AM

18 Having said all that, the only way they affect
19 us, they affect us tremendously, these new indictments, if the
20 Court decides at trial that they're going to be allowed to
21 question about that if he takes the stand. That's the way it
22 affects us.

10:08AM

23 Otherwise, consistent -- if the Fifth Circuit
24 somehow tells us -- again it's all up to how you rule. But if
25 you rule against us on qualified immunity, we go to the

10:09AM

1 Fifth Circuit. We'd be asking for a stay and that's going to
2 be -- that's going to affect your trial one way or the other,
3 at least long enough -- if they grant the stay, then, you know,
4 obviously it's affected the trial.

10:09AM

5 So I went into all that because they're all tied
6 together. That's the only reason I mention them all.

7 THE COURT: Very well, sir. Thank you.

8 MR. HARDIN: Thank you.

10:09AM

9 But I will say, if I may, I believe this deserves
10 to be a public trial.

11 THE COURT: Anyone else?

12 Counsel for the plaintiffs, just on this issue.

13 MR. DOYLE: Yeah, so on this issue --

14 THE COURT: Your name.

10:09AM

15 MR. DOYLE: Mike Doyle here for the Nicholas family.

16 I think Mr. Hardin misspoke. He actually moved
17 on behalf of Mr. Gallegos to seal the summary judgment evidence
18 so the public cannot see what really happened inside that house
19 when he murdered Ms. Nicholas and Mr. Tuttle. So that's a
20 motion they filed with this Court, which the Court granted.

10:10AM

21 With respect to this motion, the Court's
22 responsibility is to protect the Fifth --

23 THE COURT: There is no pending motion as to the
24 recently reindicted or newly indicted defendants here.

10:10AM

25 MR. DOYLE: Fair point.

1 With respect to this issue as defined by the
2 Court, the Court's responsibility is to protect the
3 Fifth Amendment rights of the defendants. The Court has been
4 very protective of that appropriately.

10:10AM 5 They've each, including Mr. Gallegos, asserted
6 that in their testimony in this case. They're certainly
7 allowed to continue to do that at trial. But the fact that
8 they may have potential criminal liability on a case
9 approaching the six-year anniversary of the deaths of these two
10:10AM 10 folks is not a basis for a forever delay of the trial from our
11 perspective.

12 THE COURT: Two points.

13 One, as you correctly point out, which I
14 appreciate, I have been very protective, aware, sympathetic --
10:11AM 15 however you want to characterize it -- to the Fifth Amendment
16 rights of the defendants in this civil action who may face
17 criminal prosecution.

18 There is a tension created by that if we go
19 forward with the civil trial as scheduled for a full, in my
10:11AM 20 view, for a full and complete airing of the facts necessary for
21 the jury to consider your allegations.

22 Some of the defendants who may be facing
23 indictment, criminal prosecution, are going to be faced with
24 this very issue as to testifying on matters which may impact
10:12AM 25 their criminal liability.

1 And I believe, as Ms. Martin pointed out, if the
2 Harris County district attorney is sitting in the back of the
3 courtroom during that testimony, it creates a tension, will
4 they be allowed to testify, or will they assert the
5 Fifth Amendment privilege.

10:12AM

6 If they assert their Fifth Amendment privilege
7 and the Court allows it, there may not be a full airing of the
8 facts that may be necessary for the jury to consider. That's
9 one.

10:13AM

10 Two, I am also very sympathetic and protective of
11 litigants' rights to be heard in court. I don't want to say I
12 push as hard as I can, but I have moved this case along as best
13 I could with all these competing interests in getting the
14 plaintiffs discovery, having information turned over to them
15 probably earlier than what the defendants wanted, and moving us
16 to what is a trial setting coming up.

10:13AM

17 So having heard those two comments from the
18 Court, the tension from the Fifth Amendment assertion perhaps
19 by some of these defendants and obviously the need in a very
20 old case to move this to trial knowing that these two may
21 overlap and prevent you from presenting certain facts or having
22 the jury hear certain facts that may be key or critical to some
23 of the questions you may ask of them.

10:14AM

24 MR. DOYLE: By the way, I do acknowledge fully the
25 Court has been on top of this case and done what's needed done

10:14AM

1 and there's a lot of things outside the Court's control that
2 have impacted the scheduling and timely trial because at the
3 end of the day, we also have the Seventh Amendment right to a
4 jury trial and adjudication, which is implicated for everybody.

10:14AM

5 And I think that the concern at this point is,
6 yeah, but we have a process that is if you want to go to trial
7 and assert the Fifth Amendment, it's respected. There's a
8 direct implication. That's just a fact.

10:14AM

9 And at this point, I don't believe we'll ever get
10 the full truth out of all these defendants. I just don't. And
11 so for my trial, I know how to put my trial on, whether they
12 assert the Fifth Amendment, whether they selectively choose to
13 talk about some things they think may be advantageous or assert
14 the Fifth Amendment issues that may not be as advantageous.

10:15AM

15 So from my perspective, the courts have a process
16 and that's assert the Fifth Amendment with the implication
17 arising therefrom. And I think that's the way the courts have
18 done it forever and I think that's the appropriate way this
19 Court can look at this because this will go on forever because
20 as long as we have people saying there might be criminal
21 possibilities or somebody saying -- in good faith or not --
22 "I'm really worried about criminal possibilities," we'll never
23 have an end date.

10:15AM

24 THE COURT: I think you answered my question and that
25 is even facing the possibility that some of the defendants may

10:15AM

1 assert the Fifth Amendment privilege, which would preclude you
2 from putting whatever answer may be forthcoming if that
3 privilege was not asserted, you would be willing to move
4 forward in the absence of that testimony which would be behind
5 a Fifth Amendment privilege?

10:16AM 6 MR. DOYLE: Right, but the jury gets to consider the
7 implication --

8 THE COURT: Right. I'm not talking about that portion
9 of it. I'm simply talking about having the defendant take the
10:16AM 10 stand, be asked a question, assert their Fifth Amendment
11 privilege, and obviously at that point not hearing the answer,
12 you would be comfortable as the plaintiffs' attorney with that?

13 MR. DOYLE: Right. Because I think that's the only
14 thing we're going to get out of these defendants for the most
10:16AM 15 part.

16 THE COURT: Understood, sir. Thank you.

17 MR. DOYLE: Thank you.

18 THE COURT: Counselor.

19 MR. SMITH: Yes, Your Honor. Not much to add.

10:16AM 20 Boyd Smith for the Tuttle plaintiffs.

21 The short answer from my perspective is that the
22 reindictment of these defendants doesn't change anything. They
23 were reindicted. They've been indicted before. Some of them
24 have taken the Fifth in their depositions, and we're prepared
10:16AM 25 to move forward.

1 THE COURT: Thank you, sir.

2 MR. DAWSON: Your Honor, may I be heard?

3 THE COURT: Briefly.

4 MR. DAWSON: Your Honor, I'd just like to point out

10:16AM 5 that I do think that the pending indictments do have an impact
6 on the City of Houston in the following respect -- and I'm not
7 a criminal law person at all -- but I'm advised that these
8 indictments are so broadly drafted that some of the questions
9 that relate to the supervision of some of the individual

10:17AM 10 defendants, the criminal lawyers have asserted Fifth Amendment
11 rights on behalf of those supervisors and therefore, it does
12 impede the City's ability to present the jury with the facts
13 about how these officers were properly supervised because
14 questions relating to their supervision and what they did to
10:17AM 15 supervise those below them, they're instructed not to answer.

16 So it does have an impact on the City, and I just
17 wanted the Court to be aware of that.

18 THE COURT: Thank you.

19 Let's turn to another issue.

10:18AM 20 The defendants -- certain defendants have not
21 filed answers and that was the result of this Court having said
22 that they didn't have to file answers until further order of
23 this Court.

24 And obviously through numerous hearings, numerous
10:18AM 25 proceedings, these parties have appeared here through lawyers,

1 filed motions, made arguments the entire time.

2 The fact that they do not have answers on file
3 has been observed by the plaintiffs, and you have moved for
4 partial summary judgment on those who have not answered; am I
10:18AM 5 correct?

6 MR. DOYLE: (Nodding head affirmatively.)

7 THE COURT: And so I find myself in an odd position of
8 being asked to grant a summary judgment for those defendants
9 who have obviously participated in these proceedings from day
10 one, they just haven't filed an answer.

11 Part of that, again, falls on the Court and the
12 way that its order was worded in that it afforded them the
13 opportunity not to answer until further order of the Court.

14 So, counsel, for you and your motion, in that
10:19AM 15 regard I'm kind of in a catch-22, because what I'm prepared to
16 do is to order them to answer. "Further order of the Court
17 being now you answer," and then in your view is this motion for
18 partial summary judgment still ripe for consideration at this
19 point?

10:20AM 20 MR. AVERY: Your Honor, Jeff Avery for the Nicholas
21 plaintiffs.

22 I do think if you order them to answer, the
23 motion would be moot based on the Court's discretion to allow
24 an answer. To date, we don't have affirmative defenses that
10:20AM 25 have been pled and things like that that are important for us,

1 that we know what's going to be raised at trial, but I do think
2 based on what the Court is saying that it would be moot.

3 THE COURT: Thank you, sir.

4 All right. For those defendants who have not
10:20AM 5 answered, you're hereby ordered to file your answer within the
6 next seven days. If you intend to assert affirmative defenses,
7 those defenses will be included in your answer.

8 Again, I understand that you were waiting.
9 There's language in my order, "Further order of the Court,"
10:20AM 10 well, this is further order of the Court.

11 So let's take this particular issue off the
12 table.

13 MS. AZADEH: Your Honor, may I?

14 THE COURT: Sure.

10:21AM 15 MS. AZADEH: Melissa Azadeh.

16 Your Honor, we do have an issue with filing
17 answers after the plaintiffs have dismissed the only claim that
18 we believe remains against all our clients except for
19 Robert Gonzales because their complaint against the defendants,
10:21AM 20 who they only had an excessive force claim against, is now moot
21 and so we don't believe it's appropriate for the Court to order
22 answers when there are no live claims against the defendants.

23 THE COURT: If you have no live claims against that
24 particular defendant, why is that defendant still here?

10:21AM 25 MS. AZADEH: We filed a motion for judgment on the

1 pleadings. The plaintiffs decided that they have a conspiracy
2 claim for the first time throughout these proceedings. They've
3 never mentioned such a claim. And so that's why we filed a
4 motion for judgment on the pleadings asking the Court to
5 dispose of the entirety of the case.

10:22AM

6 THE COURT: I'm confused, counselor.

7 MS. AZADEH: Yes.

8 THE COURT: So I'm going to give you the opportunity to
9 walk me through this.

10:22AM

10 You say that there are no claims pending against
11 certain defendants; is that correct?

12 MS. AZADEH: That is our position.

13 THE COURT: But then you mention a potential conspiracy
14 claim that the plaintiffs did, in fact, assert?

10:22AM

15 MS. AZADEH: We don't believe they asserted it. They
16 mentioned the word "conspire" in their complaints in the
17 context of claims against the City and so they don't --

18 THE COURT: So your position is that you represent
19 certain defendants that have no claims pending against them?

10:22AM

20 MS. AZADEH: That's correct.

21 THE COURT: Okay. Well, let me -- let's do it this way
22 then.

23 MS. AZADEH: Yes, Your Honor.

24 THE COURT: If you're certain of that position, don't
25 file an answer. If you believe that you're not required to

10:22AM

1 file an answer because there are no claims pending against you,
2 take that position.

3 The plaintiffs have taken the position that they
4 do have claims pending against you and have filed a motion for
10:23AM 5 partial summary judgment.

6 MS. AZADEH: Yes, Your Honor.

7 THE COURT: I'll reach a decision based upon the status
8 of the case as to whether or not you have claims pending
9 against you.

10:23AM 10 MS. AZADEH: Yes, Your Honor.

11 THE COURT: Okay?

12 MS. AZADEH: Thank you.

13 THE COURT: Anyone else need to be heard on that issue?
14 (No response.)

10:23AM 15 THE COURT: The other issue, which is not ripe for
16 consideration but does impact potentially the scheduling, which
17 is this motion for bifurcation, I want to discuss it without
18 prejudice because I freely acknowledge the plaintiffs have not
19 yet filed a response and I'm not going to hold you here to what
10:24AM 20 you say because I'll give you the opportunity to do research
21 and then file your learned response that will be afforded your
22 position in considering the motion.

23 So Mr. Dawson, I believe this is your motion.
24 Come on up. I have taken the opportunity to review your motion
10:24AM 25 in preparation for today's hearing, not for purposes of

1 ultimately ruling on it. We are in the aftermath of a very
2 public criminal trial for Mr. Goines, which was covered
3 extensively in the media. A lot of the facts regarding the
4 initial steps for bifurcation, facts that would be necessary to
5 that, were discussed in that trial and are of public record
6 now -- what the police officers did, what occurred in the
7 house, things of that nature. I would assume that the
8 plaintiffs' attorneys are going to speak to that perhaps in
9 their response.

10:25AM 10 Also you mentioned judicial efficiency, but you
11 speak of two trials; and so I'm not sure how the two of those
12 overlap, having judicial efficiency requiring two trials.

13 In the instance we have one trial, the very
14 issues you speak of can be presented to a jury; and if they
15 agree with you, then obviously that impacts the way they would
16 answer any jury questions.

17 The one thing that caught my attention, which I
18 really want you to speak to, is you said that there may be
19 a -- depending on how the Court rules, a lesser need for
20 certain testimony, which would shorten the proceedings.

21 So with that kind of background, I'll hear you.
22 And, again, you're not arguing your motion because it's not yet
23 ripe; but I'm trying to get some feedback as I consider what
24 we're going to do next month.

10:27AM 25 MR. DAWSON: So I'll try to address all the points that

1 Your Honor raised.

2 A lot of what happens next month or whenever this
3 case gets tried will depend on the Court's rulings on the
4 pending motions.

10:27AM

5 As it stands now without the Court's ruling,
6 frankly you're looking at an exceptionally long trial, probably
7 more than a month. And just so the Court knows, the plaintiffs
8 have listed 188 trial witnesses, just to give the Court some
9 idea of the size of this case.

10:27AM

10 If you were to bifurcate, as the Court knows, in
11 order to get to *Moneill* liability against the City, there has to
12 be an underlying constitutional violation and then you get into
13 the *Moneill* questions about whether or not there was custom or
14 practice.

10:28AM

15 I think the parties have stipulated that there
16 was a constitutional violation in connection with the
17 issuance -- the service of the warrant. That, frankly, issue
18 doesn't need to be tried.

10:28AM

19 If you were to bifurcate, all you would hear in
20 Phase 1 of the trial, assuming the Court denies the motions on
21 the excessive force, all you would hear is what happened that
22 day at Harding Street on that night and was that reasonable or
23 unreasonable use of force. Was there a constitutional
24 violation in connection with the use of force.

10:28AM

25 A fairly narrow issue. Fairly narrow set of

1 witnesses, again, assuming the Court doesn't grant the summary
2 judgment.

3 Conversely if the Court does grant the summary
4 judgment on excessive force, then all you would have is a
10:28AM 5 *Mone* trial on the service of the warrant and that would also
6 be a limited trial because, as the Court knows from what we
7 submitted, *Mone* liability goes into whether or not there's a
8 custom or practice that led to and enabled the constitutional
9 violation and whether the chief policymaker, Chief Acevedo, was
10:29AM 10 consciously indifferent to the dangers associated with that
11 custom or practice.

12 THE COURT: And that was kind of what I was touching on
13 in my earlier comments. In the *Goines* trial there was
14 extensive discussion, I believe, based upon media reports that
10:29AM 15 they believe that Mr. Goines had engaged in a practice of
16 submitting false affidavits and information in order to obtain
17 warrants, which go to the source of the allegations in this
18 case.

19 So when we talk about custom and practice, as to
10:30AM 20 the particular officer in question, we've had an airing of that
21 in the criminal trial, have we not?

22 MR. DAWSON: You certainly have had an airing of that,
23 I believe, in the punishment phase of the criminal trial about
24 certain instances in the past where it's alleged that
10:30AM 25 Officer Goines submitted false affidavits.

1 That may come in in the *Mone* liability for the
2 service of the warrant. That would be relevant. It would not
3 be relevant to the excessive force claim.

4 And I'll also point out, Your Honor -- and we've
5 cited this in our papers -- that the actions of one officer are
6 not sufficient to establish *Mone* liability.

7 And part of -- flip it back the other way. If
8 you try it all together, then the jury is going to hear
9 allegations for *Mone* liability about other bad acts, alleged
10 bad acts, other customs or practices at the Houston Police
11 Department that may confuse the jury with respect to the
12 constitutional violation by the individual officers, if that
13 makes any sense.

14 So I think it's true that some of this has been
15 aired in the public and that raises a whole other issue about
16 voir dire in this case in terms of how we're going to get a
17 panel. But I don't think that that -- the fact that they put
18 in evidence in the criminal trial that there were these other
19 instances that Officer Goines allegedly or did submit false
20 affidavits, doesn't suggest that you shouldn't bifurcate. And
21 I'm not arguing about bifurcation. I'm just telling you about
22 how it could be much more efficient.

23 So if I kind of come back to that point is if you
24 were to bifurcate it, you may only have the first phase of the
25 trial on the service of the warrant or you may only have

1 it -- no. Excuse me.

2 If you were to bifurcate, you would only have the
3 Phase 1 on the excessive force claim and then there would be
4 *Mone11* liability in Phase 2 for the service of the warrant and
10:32AM 5 the excessive force, again, depending on how the Court rules.

6 I just think it could well be a much more
7 streamlined trial. And I think the way it would work,
8 Your Honor, is that the same jury obviously would hear -- they
9 would make a determination on the constitutional violation; and
10:32AM 10 then depending on what they rule, then they may hear the
11 evidence on the *Mone11* liability side of it.

12 THE COURT: Well, two things.

13 One, as you pointed out in your filing, this is
14 entirely within my discretion, correct?

10:32AM 15 MR. DAWSON: It is.

16 THE COURT: And two, lengthy trials do not scare me. I
17 enjoy all of your company and will be happy to have you here.
18 So the fact that the trial is going to be a month is not a
19 deterrence to somehow obtaining judicial efficiency by having
10:33AM 20 one proceeding.

21 MR. DAWSON: Agreed. I was thinking of the jury when I
22 said that, Your Honor, not the Court. I know the Court is
23 happy to have us here for however long we're here.

24 But for the jury, if they could hear what they
10:33AM 25 needed to hear and have this case adjudicated in two weeks as

1 opposed to five weeks, that's better and fairer to the jury in
2 my opinion.

3 THE COURT: Thank you, Mr. Dawson.
4 Counselor?

10:33AM 5 MR. DOYLE: Mike Doyle here for the Nicholas
6 plaintiffs.

7 I guessed, and this is a guess, and obviously
8 we'll give you a motion laying out in full. But any time
9 somebody says, hey -- no matter how willing the Court is to
10:33AM 10 take on a short case, hey, here's a way to shortcut it, it
11 would be enticing. And I think for a number of reasons,
12 including what we'll add further, that would be the wrong path.

13 The very practical one is as a factual matter --
14 and I get we have a long witness list. I think realistically
10:34AM 15 we're looking at 31 witnesses, 10 of which are video
16 depositions, fairly concise. It still will be several weeks.
17 I get that. But I don't see but maybe one or two of those that
18 would not be necessary to be called if we had to do it twice.
19 And that costs a lot of money and a lot of judicial resources.

10:34AM 20 More directly, the Fifth Circuit has fairly
21 recently spoken while it's within your discretion, I think
22 would be fair in saying -- and there's a case that came out in
23 August, *Sims versus City of Jasper*, August 28th, it's
24 disfavored at this point for the practical reasons that the
10:34AM 25 Court is aware of as well as the implications of the

1 Seventh Amendment right to have a jury adjudicate in one single
2 instance a factual issue. Because the idea being one jury, one
3 does it.

4 But I think really the criminal case that we all
10:35AM 5 were aware of really proves our point that there's no unlinking
6 this bad conduct in this particular Squad 15 for years and
7 years and there's no way to fairly give the story if you're
8 trying to flood it out.

9 And as clearly as the judge in the criminal case
10:35AM 10 tried to keep it focused, because she needed to, she also
11 recognized practically you cannot untangle the corruption and
12 conduct of this squad in the trial that you put on, whether
13 it's just focused on one part or the other.

14 And by the way, it's not automatic that you start
10:35AM 15 with the excessive force. You could much easily -- and I'm not
16 saying you should, because I don't think you should -- it's
17 already been adjudicated, they've already agreed they have
18 illegal conduct in this squad occurring with respect to service
19 of warrant. But I don't think any one of those.

10:35AM 20 But I think when you look at the recent
21 Fifth Circuit jurisprudence, just the fact that they could not
22 try the criminal case without entangling it and showing the
23 pattern and practice of the Houston Police Department really
24 directly in a very practical way shows this is not possible.

10:36AM 25 THE COURT: Very well.

1 I think another thing that might be undersold
2 here is when you're talking about time, lawyer time versus
3 judge time. And what you think is going to take a certain
4 amount of time, I assure you, it will not because I will make
10:36AM 5 sure that it does not. We're going to be very efficient in
6 whatever presentation occurs.

7 So your 130-witness list, whatever the case may
8 be, we are going to respect the jury's time; and we're going to
9 do it in an efficient manner. And that will be -- those of you
10:36AM 10 who have tried proceedings with me, you know that it's a
11 frequent subject that I have throughout the trial to make sure
12 that we're being efficient and we're not overly repeating
13 ourselves.

14 Final issue and then I'll give you a chance to
10:37AM 15 bring to my attention whatever else you need. Well, two other
16 issues.

17 I understand that there are a number of motions
18 for summary judgment pending. We're working through those as
19 efficiently as possible. And so hopefully over the next few
10:37AM 20 weeks we're going to start pushing out some orders on those
21 motions as well.

22 Realistically, based upon what I have on my plate
23 with this case, this case alone, it's going to be hard to hold
24 you to your November trial setting. I do not know -- perhaps
10:38AM 25 something in early spring, which will just give me

1 approximately another 60 or 90 days to work through some of the
2 issues that have been presented by the reindictment,
3 consideration of this bifurcation request. I do not see a need
4 to push this off very long, but I do believe you're entitled to
10:38AM 5 get the Court's ruling on some of these very important motions
6 that you filed.

7 I don't see a reason why we couldn't get with
8 what the Court has to do -- I'm still using my school terms --
9 we couldn't get this tried before spring break, which means
10:39AM 10 sometime before mid-March, which will give me some additional
11 time to do what I need to do.

12 I really need to give some consideration to this
13 issue about moving the case forward with these indictments
14 pending, structuring the presentation of the evidence and what
10:39AM 15 that means. I didn't anticipate that. I really didn't. I
16 thought that we were coming to the end on the criminal side.
17 But I'm not in control of that. It's not my responsibility.
18 Someone else made a decision; and as a result, it's impacted
19 what we're doing here.

10:39AM 20 I can tell you -- and I've not yet made the
21 decision -- it's really my desire to try this case one time and
22 I'd like to figure out a way to do that if possible -- if
23 possible. I think that's the best use of the Court's resources
24 and time and a jury's time is to try this case one time if
10:40AM 25 possible. And so I need to get an understanding if that's

1 possible.

2 So what I'm going to do now is invite a very
3 brief response on a couple of issues. If the Court tries this
4 case sometime before the end of March, what does your calendar
10:41AM 5 look like?

6 If you need to pull your phone out to check your
7 calendar or something, feel free to do that.

8 Two, not in an attempt to scare the Court, give
9 me an estimate -- I believe a couple of you have tried cases
10:41AM 10 with me. Just as a remainder, I try cases Monday through
11 Thursday. It has been the Court's experience that by way of
12 evidence you get six to six and a half hours of evidence per
13 day. Just with the jury's lunch, breaks and dealing with
14 things that come up during trial, it's approximately about six
10:41AM 15 hours of evidence per day.

16 So in a week, you're going to have 24 hours of
17 evidence. For every week, every four days of trial, I would
18 anticipate you're going to have a day of deliberations. So if
19 you have a three-week trial, you're going to have perhaps up to
10:42AM 20 three days of deliberations.

21 In a case like this, I suspect it's going to take
22 all day to pick a jury at least. Because of the press coverage
23 of the case, at a minimum we're talking about a day of jury
24 trial -- I mean of jury selection.

10:42AM 25 So with those kind of time frames, guidelines in

1 place, what do you anticipate the length of the trial to be
2 from picking the jury through jury deliberations such that as
3 we look for opportunities on the Court's calendar, I could have
4 it placed appropriately?

10:42AM

5 I do not anticipate trying this case in January.
6 So we're really looking at February or March. And depending on
7 what you tell me, I hope that's where we're going to talk
8 about.

9 So with that being said -- oh, final thing.

10:43AM

10 If we have said something here today -- I've said
11 something here today that requires you to have a brief -- and I
12 do mean brief clarification or to bring something else to my
13 attention -- I'll give you that opportunity as I always do.

14 So let me start with plaintiffs' counsel.

10:43AM

15 MR. DOYLE: Yes, Your Honor. Mike Doyle.

16 And I understand the Court's reasoning. So
17 having sketched out -- and I know. I've tried several cases
18 before you. I think I share your interest in efficient
19 presentation because I think that helps the jurors and helps
20 me.

10:43AM

21 I think we should be able to in seven days of
22 evidence, so a day for voir dire, openings, hopefully -- I've
23 got it down, I think, 29 total witnesses, including 10 videos,
24 so 19 live witnesses I think we can do in -- now, I'm not in
25 control of cross-examination. Where it would be reasonably

10:44AM

1 measured up with our direct, that would be about two weeks of
2 trial time. If they go longer, which -- I'm not trying to cast
3 aspersions, I've just been through a lot of depositions -- it
4 may go into, like, 10 days of trial time for our case-in-chief.

10:44AM 5 That would be my guesstimate based on
6 reasonable -- if I go 30 minutes with a witness, they're not
7 going to go two hours every time. And the videos obviously, we
8 filed the proffers. Right now they're a little long. I
9 anticipate shortening them so that the videos would be
10:44AM 10 approximately 20 to 30 minutes max, maybe one or two a little
11 bit longer would be my estimate.

12 THE COURT: So if I'm hearing you correctly, you're
13 talking three to four weeks of trial.

14 MR. DOYLE: I think that's right.

15 THE COURT: Okay.

16 MR. DOYLE: And obviously, you know, they may have a
17 lot of folks they want to put on, but that's right.

18 And in terms of dates, looking at the calendar,
19 if you're talking not January, then February for a start date
10:45AM 20 or March for a start date would be the -- I have other matters
21 obviously, but this is --

22 THE COURT: February 4th or March 4th is what you're
23 saying?

24 MR. DOYLE: Correct, Your Honor.

10:45AM 25 THE COURT: Anything else you need to bring up --

1 MR. DOYLE: On those two issues, I think you've got it.

2 THE COURT: Thank you.

3 Counsel.

4 MR. SMITH: Your Honor, Boyd Smith for the Tuttles.

10:45AM 5 Mr. Doyle and I have talked about that. I agree
6 with his assessment of the potential length of the trial. I
7 did have one very minor question for Your Honor.

8 THE COURT: Yes, sir.

9 MR. SMITH: Having read your court procedures, I see
10:45AM 10 that your procedures say that the Court would like notebooks
11 full of paper depositions.

12 THE COURT: Repeat that.

13 MR. SMITH: Your procedures say that the Court would
14 like notebooks full of trial exhibits.

10:45AM 15 THE COURT: Yes.

16 MR. SMITH: We've got a mountain of exhibits in this
17 case.

18 THE COURT: And let me explain that. It's not a
19 hard-and-fast rule. Typically what happens, the reason that's
10:45AM 20 in there is during trial, you want to introduce an exhibit,
21 there's an objection and then I need to look at it.

22 MR. SMITH: Right.

23 THE COURT: And so if there's a notebook up here,
24 that's the easiest thing; but if I have a thumb drive, I do
10:46AM 25 have the ability to stick a thumb drive in and pull it up and

1 review it on my laptop up here if needed.

2 MR. SMITH: Yes, sir.

3 THE COURT: So if it turns out that you're talking
4 about trying to kill half of the East Texas forest to put a
5 book on my bench, I'm not for that.

10:46AM

6 MR. SMITH: Yes, sir.

7 THE COURT: I'll be happy to go the thumb drive way.
8 But I would, even in that instance, probably have a notebook of
9 key exhibits, the physical ones that I can read along with you
10 and look at, the key ones, not all of them, that might be
11 helpful.

10:46AM

12 MR. SMITH: Understood, Your Honor. Thank you.

13 THE COURT: All right. Mr. Dawson, we'll start with
14 you.

10:46AM

15 MR. DAWSON: Your Honor, in terms of the length of
16 trial, I would estimate five weeks. Just -- that's my
17 estimate. And I appreciate Mr. Doyle's expressions about being
18 efficient and I hope that that is certainly the case. It might
19 be less; but just based on my experience in this case, that's
20 my best estimate for the length of trial from the start of
21 voir dire until the conclusion of the trial.

10:47AM

22 In terms of scheduling, I do have a personal
23 issue that I'm going to willingly concede, but I'd like to
24 explain it to the Court if you don't mind.

10:47AM

25 My law school moot court partner is the president

1 of ABOTA this year. She takes that position in January. And a
2 couple of years ago she said to me, "I need you to promise me
3 that when I'm president, you're going to go on the ABOTA
4 international trip," which I promised and which I have booked,
5 which is March 24th through April 7th.

6 Having said that, Your Honor, if you decide you
7 have to schedule this trial and it has to -- I can't go on that
8 trip, I get it. This is more important. But I did want to
9 tell you that there is that potential complication. That's the
10 only complication that I have, and I think Mr. Odom has. We
11 can, otherwise, whatever the Court schedules is fine with us.

12 I would suggest that if you would allow me, that
13 the Court consider two other issues.

14 One is perhaps it makes sense for us to refile
15 exhibit lists and pretrial orders and witness lists after the
16 Court rules on the pending motions for summary judgment because
17 that may have an impact on what we present to the Court.

18 And then my other suggestion is I think that
19 depending on what you want to cover in the pretrial
20 conference -- for the current setting, we had a pretrial
21 conference on the Friday before the trial setting. I think
22 that pretrial conference, just to get through motions *in limine*
23 is going to be lengthy; and so I just wanted to bring that to
24 your attention.

25 THE COURT: Yeah. I don't anticipate a pretrial

1 conference that's going to be a couple of hours. I suspect
2 that we'll have a day set aside. We'll start in the morning
3 and just go through as much as we can to knock some of that
4 out.

10:49AM 5 So, yes, thank you. I think those are fine
6 suggestions by the way.

7 And I do anticipate after ruling perhaps giving
8 you some pretrial trial deadlines, perhaps amended exhibit
9 lists, amended motions *in limine*, things of that nature, simply
10 to -- if there can be some efficiency after the Court's
11 ruling -- I'm not opening up pleading practice. But, okay, the
12 Court has now ruled. We don't need this witness or the Court
13 ruled and perhaps this motion *in limine* is no longer needed and
14 that type of thing.

10:50AM 15 So that's a fine suggestion. Thank you, sir.

16 Let's go around the table this way.

17 Mr. Hardin, anything by way of your calendar?

18 MR. HARDIN: Thank you, Your Honor. Rusty Hardin for
19 Mr. Gallegos.

10:50AM 20 I asked my office to send it to me because I know
21 I have multiple trials in that part of the year. I wanted to
22 be able to inform you with accuracy rather than my guesses. I
23 do know that Judge Barbara Lynn is retiring in Dallas in June.
24 I think we're her last scheduled trial, which starts, I think,
10:50AM 25 January 24th in Midland.

1 And Judge Hanen, one day apart of that, I forgot
2 which is which, has a trial starting -- has a criminal trial
3 starting here.

4 The Midland case is estimated to last about three
5 weeks. It could be shorter.

6 The trial in Judge Hanen's court is scheduled for
7 some time. I may be the crazy aunt in the attic, but I think
8 people are woefully optimistic about how long this is going to
9 take.

10 If all the officers stay in and if we don't get a
11 stay and if you rule against us and we are not successful in
12 getting a stay from the Fifth Circuit, then I just can't
13 imagine -- let me put it this way: I've only been in two or
14 three multi-defendant cases, never more than four defendants at
15 a time. So I've not been in one in which potentially there are
16 this many defendants.

17 The relevance of that, of course, is
18 cross-examination. As this Court well knows, that's many times
19 the heart of the defense's case. And I think this idea of
20 putting on a case in the amount of time the plaintiffs think,
21 you have to remember our position is sort of like
22 *My Cousin Vinny*. Everything they have been saying is you know
23 what, okay? And it didn't happen the way they have consented.

24 And it's important for people to remember the
25 criminal trial for everybody except Mr. Goines is really

1 irrelevant to what's happening here. What was tried there, as
2 you know, was whether an affidavit was a felony -- false
3 affidavit, which, of course, it was, and whether that caused
4 the death. And that's all it was.

10:52AM

5 It wasn't about excessive force. It wasn't about
6 what the other officers knew or didn't know.

7 THE COURT: Mr. Hardin, before I hear that argument,
8 let me refine the case by ruling and then I'll hear you on that
9 argument.

10:52AM

10 But I suspect -- I do not -- I'm kind of in
11 between the two of you. I do not think it's going to be as
12 quick as the plaintiffs think, but I assure you it will not be
13 as long as you're suggesting either. I kind of fall in the
14 middle as to where it's going to take. Having now presided
15 over multiple-defendant trials, the Court has always had the
16 ability to find some efficiencies that attorneys overlook.

10:53AM

17 MR. HARDIN: I understand that, Your Honor. I just
18 mean that if I speak only for my client's case --

19 THE COURT: I understand what you're saying.

10:53AM

20 MR. HARDIN: There is considerable cross-examination of
21 every one of these things. We believe the Court has been
22 misled throughout these six years, and that's why I want a
23 public trial.

24 THE COURT: Very well.

10:53AM

25 MR. HARDIN: Thank you, sir. And I'm doing a calendar.

1 Maybe at the end of this, I'll have it.

2 THE COURT: I will say that I'm prepared to bump
3 Judge Hanen, I'm not prepared to bump Judge Lynn. So I'll
4 leave it at that.

10:53AM

5 Counselor.

6 MR. NACHTIGALL: Good morning, Your Honor.
7 David Nachtigall for Steven Bryant.

8 Mine is a personal conflict. HISD spring break
9 is March 10th through 17th. I am a single parent of two
10 elementary school-aged children.

10:54AM

11 THE COURT: 10th through 17th?

12 MR. NACHTIGALL: 10th through the 15th, I guess. The
13 17th is the Monday following.

14 THE COURT: Very well.

10:54AM

15 MR. NACHTIGALL: And I would only request that the
16 Court consider that accommodation. I think it may impact
17 jurors as well.

18 THE COURT: Yes, it does typically. Thank you.

19 MR. NACHTIGALL: Thank you.

10:54AM

20 THE COURT: Counsel.

21 MR. DAWSON: Judge, Dwayne Day on behalf of
22 Gerald Goines.

23 I have no issues with the scheduling the Court is
24 recommending.

10:54AM

25 THE COURT: Very well.

1 Counsel.

2 MS. TAYLOR: Your Honor, Michelle Taylor on behalf of
3 Ashraf and Salazar.

4 My conflict is the same as counsel.

10:54AM 5 THE COURT: It's spring break.

6 MS. TAYLOR: I have two school-aged children.

7 THE COURT: Understood.

8 Counsel?

9 MR. GARCIA: Alexander Garcia.

10:54AM 10 No conflicts.

11 THE COURT: Very well.

12 Counsel?

13 MS. AZADEH: Melissa Azadeh.

14 No conflicts.

10:55AM 15 THE COURT: Ms. Martin?

16 MS. MARTIN: Christy Martin.

17 I also have a spring break conflict with
18 school-aged children.

19 THE COURT: Mr. Odom?

10:55AM 20 MR. ODOM: Judge, I think Mr. Dawson accurately stated
21 my position. I have no conflicts.

22 THE COURT: Very well.

23 (Off-the-record discussion.)

24 THE COURT: Pull out your calendars and tell me what
10:56AM 25 this looks like. And before you answer, understand that

1 Ms. Edwards is looking at you when you respond, because she has
2 gone through the Court's calendar and taken a look at what
3 we're talking about.

4 Your docket call -- based upon the length that
10:56AM 5 you're talking about, May 2nd, 10 A.M. Assume that's going to
6 be all day. Trial starting May 5th.

7 That avoids the spring break issues and obviously
8 gives the Court more than enough time to work through some of
9 the issues that have been presented through some of the motions
10:56AM 10 that are currently pending. I hope that there are no other
11 earth-shattering issues as well.

12 So take a look at your calendars. I don't need
13 consent. I need objections.

14 MR. SMITH: No objections, Judge.

10:57AM 15 THE COURT: Okay. No objections. I don't hear any. I
16 don't see any. I don't see any.

17 Okay. So I know that I earlier denied a motion
18 for a continuance to keep your feet to the fire. If you have a
19 problem with that, blame Otway Denny. He told me a long time
10:57AM 20 ago before I became a judge, if you want a lawyer's attention,
21 give him a firm deadline and a trial setting, so I've tried to
22 adhere to that practice.

23 May 2nd, 10 A.M., docket call; trial May 5th. So
24 we can get the case tried at least before the summer. And
10:58AM 25 based upon all the rulings that the Court has to provide, it at

1 least gives me some time to work through that.

2 Counsel for the plaintiff, anything else, sir?

3 MR. DOYLE: Mike Doyle.

4 Nothing further.

10:58AM 5 THE COURT: Counsel?

6 MR. SMITH: No, Your Honor.

7 THE COURT: Counsel for the defense, anything else?

8 MR. DAWSON: No, Your Honor.

9 MR. HARDIN: No, Your Honor.

10:58AM 10 MR. NACHTIGALL: No, Your Honor.

11 MR. DAY: No, Your Honor.

12 MS. TAYLOR: No, Your Honor.

13 MR. GARCIA: No, Your Honor.

14 MS. AZADEH: No, Your Honor.

10:58AM 15 THE COURT: Thank you for your attention this morning,
16 counsel. You're excused.

17 (The proceedings were adjourned.)

18 * * * *

19 REPORTER'S CERTIFICATE

20 I, Lanie M. Smith, CSR, RMR, CRR, Official
21 Court Reporter, United States District Court, Southern District
22 of Texas, do hereby certify that the foregoing is a true and
23 correct transcript, to the best of my ability and
understanding, from the record of the proceedings in the
above-entitled and numbered matter.

24 /s/ Lanie M. Smith
25 Official Court Reporter

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/s [1] - 42:24	77002 [4] - 2:16, 2:19, 3:2, 3:11 77002-0368 [1] - 3:6 77007 [1] - 2:6 77008 [1] - 2:10 77010 [3] - 2:3, 2:13, 2:23 77019 [2] - 1:18, 1:23 7th [1] - 35:5	accuracy [1] - 36:22 accurately [1] - 40:20 Acevedo [1] - 23:9 acknowledge [2] - 13:24, 20:18 action [1] - 12:16 actions [1] - 24:5 acts [2] - 24:9, 24:10 actually [1] - 11:16 add [2] - 15:19, 26:12 additional [1] - 29:10 address [2] - 5:22, 21:25 adhere [1] - 41:22 adjourned [1] - 42:17 adjudicate [1] - 27:1 adjudicated [2] - 25:25, 27:17 adjudication [1] - 14:4 advantageous [2] - 14:13, 14:14 advised [1] - 16:7 affect [4] - 5:16, 10:18, 10:19, 11:2 affected [1] - 11:4 affects [1] - 10:22 affidavit [3] - 9:20, 38:2, 38:3 affidavits [3] - 23:16, 23:25, 24:20 affirmative [2] - 17:24, 18:6 affirmatively [1] - 17:6 afforded [2] - 17:12, 20:21 after [4] - 18:17, 35:15, 36:7, 36:10 aftermath [1] - 21:1 again [10] - 6:8, 6:16, 6:17, 8:1, 10:24, 17:11, 18:8, 21:22, 23:1, 25:5 against [16] - 5:21, 10:1, 10:25, 18:18, 18:19, 18:20, 18:22, 18:23, 19:10, 19:17, 19:19, 20:1, 20:4, 20:9, 22:11, 37:11 aged [3] - 39:10, 40:6, 40:18 ago [2] - 35:2, 41:20 agree [2] - 21:15, 33:5 agreed [2] - 25:21, 27:17 aired [1] - 24:15 airing [4] - 12:20, 13:7, 23:20, 23:22 AI [1] - 2:4 al [3] - 4:4, 4:5, 4:14 AL [2] - 1:4, 1:7 ALBERT [1] - 1:10 Alexander [3] - 3:1, 4:22, 40:9 Alistair [2] - 2:1, 4:12 all [26] - 5:9, 9:20, 10:18, 10:24, 11:5, 11:6, 13:13, 14:10, 16:7, 18:4, 18:18, 21:25, 22:19, 22:21, 23:4, 24:8, 25:17, 27:4, 30:22, 34:10, 34:13, 37:10, 38:4, 41:6, 41:25 allegations [3] - 12:21, 23:17, 24:9 alleged [2] - 23:24, 24:9 allegedly [1] - 24:19 Allen [4] - 1:18, 1:22, 2:8, 2:22 allow [2] - 17:23, 35:12 allowed [3] - 10:20, 12:7, 13:4 allows [1] - 13:7 alone [1] - 28:23
1	8	
1 [2] - 22:20, 25:3 10 [5] - 26:15, 31:23, 32:4, 41:5, 41:23 100 [3] - 1:22, 2:9, 2:22 10th [3] - 39:9, 39:11, 39:12 1221 [1] - 2:3 130-witness [1] - 28:7 1401 [1] - 2:12 15 [1] - 27:6 1545 [1] - 2:9 15th [1] - 39:12 17th [3] - 39:9, 39:11, 39:13 188 [1] - 22:8 19 [1] - 31:24	8004 [1] - 3:11	
2	9	
2 [1] - 25:4 20 [1] - 32:10 2024 [1] - 1:7 225 [1] - 2:6 2250 [1] - 2:13 24 [1] - 30:16 24th [2] - 35:5, 36:25 28th [1] - 26:23 29 [2] - 1:7, 31:23 2929 [1] - 1:18 2nd [2] - 41:5, 41:23	90 [1] - 29:1 900 [3] - 2:16, 2:19, 3:2	
3	A	
30 [2] - 32:6, 32:10 31 [1] - 26:15 3401 [2] - 1:22, 2:22 368 [1] - 3:5 3900 [1] - 1:18	a [151] - 4:16, 5:13, 5:20, 6:22, 7:16, 7:19, 8:1, 8:2, 8:7, 8:10, 8:15, 8:17, 9:4, 9:20, 9:21, 9:24, 10:2, 11:1, 11:10, 11:19, 12:8, 12:10, 12:18, 12:19, 12:20, 13:3, 13:7, 13:16, 13:19, 14:1, 14:3, 14:6, 14:7, 14:8, 14:15, 15:5, 15:10, 16:7, 17:8, 17:15, 18:25, 19:1, 19:3, 19:13, 20:4, 20:7, 20:19, 21:1, 21:3, 21:14, 21:19, 22:2, 22:7, 22:16, 22:23, 22:25, 23:4, 23:6, 23:7, 23:15, 24:15, 24:16, 25:6, 25:9, 25:18, 26:7, 26:8, 26:10, 26:11, 26:13, 26:14, 26:19, 26:22, 27:1, 27:2, 27:24, 28:3, 28:10, 28:14, 28:17, 29:3, 29:7, 29:18, 29:22, 29:24, 30:2, 30:3, 30:9, 30:10, 30:12, 30:16, 30:18, 30:19, 30:21, 30:22, 30:23, 31:11, 31:22, 32:3, 32:6, 32:8, 32:10, 32:16, 32:19, 32:20, 33:16, 33:18, 33:23, 33:24, 33:25, 34:4, 34:8, 34:22, 35:1, 35:20, 35:25, 36:1, 36:2, 36:15, 37:2, 37:10, 37:12, 37:15, 37:20, 38:2, 38:22, 38:25, 39:8, 39:9, 40:17, 41:2, 41:12, 41:17, 41:18, 41:19, 41:20, 41:21, 42:21 A.M [2] - 41:5, 41:23 ability [4] - 16:12, 33:25, 38:16, 42:21 able [2] - 31:21, 36:22 ABOTA [2] - 35:1, 35:3 about [30] - 5:9, 10:8, 10:21, 14:13, 14:22, 15:8, 15:9, 16:13, 22:13, 23:19, 23:23, 24:9, 24:15, 24:21, 28:2, 29:13, 30:14, 30:23, 31:8, 32:1, 33:5, 34:4, 34:17, 37:4, 37:8, 38:5, 41:3, 41:5 above [1] - 42:22 above-entitled [1] - 42:22 absence [1] - 15:4 absolutely [1] - 8:9 accessible [1] - 9:5 accommodation [1] - 39:16	
4		
4500 [1] - 2:3 4:21-CV-00270 [1] - 1:4 4:21-cv-270 [1] - 4:4 4th [5] - 2:16, 2:19, 3:2, 32:22		
5		
515 [1] - 3:10 5th [2] - 41:6, 41:23		
6		
60 [1] - 29:1 601 [1] - 2:5		

along [2] - 13:12, 34:9
already [3] - 7:7, 27:17
also [11] - 5:17, 8:14, 10:14, 10:16, 13:10, 14:3, 21:10, 23:5, 24:4, 27:10, 40:17
although [1] - 8:24
always [2] - 31:13, 38:15
am [3] - 13:10, 17:4, 39:9
amended [2] - 36:8, 36:9
Amendment [18] - 6:6, 10:6, 10:10, 12:3, 12:15, 13:5, 13:6, 13:18, 14:3, 14:7, 14:12, 14:14, 14:16, 15:1, 15:5, 15:10, 16:10, 27:1
amount [2] - 28:4, 37:20
an [31] - 5:16, 5:18, 6:2, 6:3, 7:25, 8:3, 8:21, 10:4, 14:23, 16:5, 16:16, 17:7, 17:10, 17:24, 18:16, 18:20, 19:25, 20:1, 22:6, 22:12, 23:20, 23:22, 28:9, 29:25, 30:8, 30:9, 33:20, 33:21, 35:17, 38:2
and [195] - 2:15, 2:18, 3:1, 3:5, 4:19, 4:20, 4:22, 4:25, 5:9, 5:14, 5:15, 5:20, 5:22, 5:23, 6:7, 6:16, 6:24, 7:3, 7:5, 7:7, 7:17, 7:18, 7:23, 7:25, 8:5, 8:13, 8:15, 8:19, 8:24, 8:25, 9:3, 9:5, 9:7, 9:9, 9:17, 9:19, 9:20, 10:1, 10:2, 10:3, 10:4, 10:11, 10:17, 11:1, 11:19, 12:20, 13:1, 13:7, 13:10, 13:15, 13:19, 13:21, 13:25, 14:1, 14:2, 14:4, 14:5, 14:7, 14:9, 14:10, 14:16, 14:17, 14:18, 14:24, 15:11, 15:24, 16:6, 16:11, 16:14, 16:16, 16:21, 16:24, 17:3, 17:7, 17:11, 17:14, 17:17, 17:25, 18:21, 19:3, 19:17, 20:4, 20:19, 20:21, 21:5, 21:11, 21:14, 21:22, 22:7, 22:12, 22:22, 23:5, 23:8, 23:9, 23:12, 23:16, 23:19, 24:4, 24:7, 24:15, 24:20, 25:3, 25:4, 25:7, 25:9, 25:16, 25:17, 25:25, 26:1, 26:7, 26:11, 26:14, 26:19, 26:22, 27:6, 27:7, 27:9, 27:11, 27:14, 27:15, 27:22, 27:23, 28:3, 28:8, 28:9, 28:12, 28:14, 28:19, 29:14, 29:18, 29:20, 29:21, 29:24, 29:25, 30:12, 30:13, 31:6, 31:11, 31:16, 31:17, 31:19, 32:7, 32:16, 32:18, 33:5, 33:18, 33:19, 33:21, 33:23, 33:25, 34:10, 34:17, 34:18, 35:1, 35:4, 35:7, 35:10, 35:15, 35:18, 35:23, 36:3, 36:7, 36:13, 37:1, 37:10, 37:11, 37:19, 37:23, 37:24, 38:3, 38:4, 38:8, 38:22, 38:25, 39:15, 40:3, 40:24, 40:25, 41:2, 41:7, 41:21, 41:24, 42:21, 42:21, 42:22
AND [1] - 2:12
anniversary [1] - 12:9
announcements [1] - 5:5
another [3] - 16:19, 28:1, 29:1
answer [17] - 6:18, 15:2, 15:11, 15:21, 16:15, 17:10, 17:13, 17:16, 17:17, 17:22, 17:24, 18:5, 18:7, 19:25, 20:1, 21:16, 40:25
answered [3] - 14:24, 17:4, 18:5
answers [5] - 16:21, 16:22, 17:2,

18:17, 18:22
anticipate [7] - 29:15, 30:18, 31:1, 31:5, 32:9, 35:25, 36:7
any [10] - 5:5, 6:1, 9:13, 21:16, 24:13, 26:8, 27:19, 41:15, 41:16
anybody [2] - 7:12, 7:20
anyone [4] - 8:10, 9:13, 11:11, 20:13
anything [6] - 10:10, 15:22, 32:25, 36:17, 42:2, 42:7
apart [1] - 37:1
apologize [1] - 6:24
appeal [1] - 10:3
APPEARANCES [1] - 1:14
appearances [1] - 4:6
appeared [1] - 16:25
appearing [1] - 5:8
applies [1] - 9:23
appreciate [2] - 12:14, 34:17
approaching [1] - 12:9
appropriate [2] - 14:18, 18:21
appropriately [2] - 12:4, 31:4
approximately [3] - 29:1, 30:14, 32:10
April [1] - 35:5
are [24] - 6:23, 7:4, 7:5, 7:17, 9:4, 12:23, 16:8, 17:25, 18:22, 19:10, 20:1, 21:1, 21:5, 21:8, 24:5, 26:15, 28:8, 28:17, 36:5, 37:8, 37:11, 37:15, 41:10
arguing [2] - 21:22, 24:21
argument [3] - 8:2, 38:7, 38:9
arguments [1] - 17:1
arising [1] - 14:17
around [1] - 36:16
as [53] - 5:23, 7:8, 7:23, 7:24, 8:2, 10:3, 10:7, 11:23, 12:1, 12:13, 12:19, 12:24, 13:1, 13:12, 14:14, 14:20, 15:12, 20:8, 21:23, 22:5, 22:10, 23:6, 23:19, 25:13, 25:25, 26:13, 26:25, 27:9, 28:18, 28:19, 28:21, 29:18, 30:10, 31:2, 31:13, 36:3, 37:18, 38:1, 38:11, 38:12, 38:13, 38:14, 39:17, 40:4, 41:11
Ashraf [2] - 4:24, 40:3
ASHRAF [1] - 2:18
aside [1] - 36:2
ask [2] - 10:2, 13:23
asked [4] - 9:24, 15:10, 17:8, 36:20
asking [3] - 8:7, 11:1, 19:4
aspersions [1] - 32:3
assert [10] - 13:4, 13:6, 14:7, 14:12, 14:13, 14:16, 15:1, 15:10, 18:6, 19:14
asserted [4] - 12:5, 15:3, 16:10, 19:15
assertion [1] - 13:18
assertions [1] - 6:5
assessment [1] - 33:6
associated [1] - 23:10
ASSOCIATES [1] - 2:12
Assume [1] - 41:5
assume [1] - 21:7
assuming [2] - 22:20, 23:1
assure [2] - 28:4, 38:12

AT [2] - 2:8, 2:22
at [33] - 7:15, 8:1, 10:20, 11:3, 12:7, 14:2, 14:5, 14:9, 14:19, 15:11, 16:7, 17:18, 18:1, 22:6, 22:22, 24:10, 26:15, 26:24, 27:20, 30:22, 30:23, 31:6, 32:18, 33:21, 34:10, 37:14, 39:1, 39:4, 41:1, 41:2, 41:12, 41:24, 41:25
attempt [1] - 30:8
attention [6] - 21:17, 28:15, 31:13, 35:24, 41:20, 42:15
attic [1] - 37:7
attorney [3] - 6:12, 13:2, 15:12
ATTORNEY [2] - 2:8, 2:22
Attorney's [1] - 6:21
attorneys [3] - 7:10, 21:8, 38:16
August [2] - 26:23
aunt [1] - 37:7
automatic [1] - 27:14
AVERY [2] - 4:9, 17:20
Avery [3] - 1:21, 4:9, 17:20
avoids [1] - 41:7
aware [6] - 6:3, 10:6, 12:14, 16:17, 26:25, 27:5
Azadeh [5] - 3:4, 4:20, 8:12, 18:15, 40:13
AZADEH [16] - 4:20, 8:12, 9:12, 18:13, 18:15, 18:25, 19:7, 19:12, 19:15, 19:20, 19:23, 20:6, 20:10, 20:12, 40:13, 42:14

B

B [1] - 2:1
back [4] - 7:10, 13:2, 24:7, 24:23
background [1] - 21:21
bad [3] - 24:9, 24:10, 27:6
Bagby [3] - 2:16, 2:19, 3:2
Barbara [1] - 36:23
BARROW [1] - 1:17
based [10] - 8:21, 17:23, 18:2, 20:7, 23:14, 28:22, 32:5, 34:19, 41:4, 41:25
basis [1] - 12:10
be [83] - 4:3, 5:22, 7:19, 8:5, 8:20, 8:25, 9:2, 9:14, 9:21, 10:5, 10:20, 11:1, 11:2, 11:10, 12:22, 12:23, 13:4, 13:7, 13:8, 13:11, 13:22, 14:13, 14:14, 14:20, 15:2, 15:3, 15:4, 15:10, 15:12, 16:2, 16:17, 17:23, 18:1, 18:2, 18:7, 20:13, 20:21, 21:4, 21:14, 21:18, 22:12, 22:18, 23:6, 24:2, 24:3, 24:22, 25:3, 25:6, 25:17, 25:18, 26:11, 26:12, 26:16, 26:18, 26:22, 28:1, 28:5, 28:8, 28:9, 28:23, 31:1, 31:21, 31:25, 32:1, 32:5, 32:9, 32:11, 32:20, 34:7, 34:10, 34:19, 35:23, 36:1, 36:10, 36:22, 37:5, 37:7, 38:11, 38:12, 41:6
became [1] - 41:20
because [28] - 6:23, 7:1, 7:3, 7:13, 8:17, 8:21, 11:5, 14:2, 14:19, 15:13, 16:13, 17:15, 18:19, 20:1, 20:18, 20:20, 21:22, 23:6, 27:2, 27:10, 27:16, 28:4,

30:22, 31:19, 35:16, 36:20, 41:1

BECK [1] - 2:2

become [1] - 6:3

been [22] - 5:11, 6:11, 7:12, 7:20, 8:19, 9:8, 12:3, 12:14, 13:25, 15:23, 17:3, 17:25, 24:14, 27:17, 29:2, 30:11, 32:3, 37:13, 37:15, 37:22, 38:21, 41:9

before [10] - 15:23, 29:9, 29:10, 30:4, 31:18, 35:21, 38:7, 40:25, 41:20, 41:24

BEFORE [1] - 1:10

beforehand [1] - 10:3

beginning [1] - 9:18

behalf [5] - 9:16, 11:17, 16:11, 39:21, 40:2

behind [1] - 15:4

being [9] - 6:2, 6:4, 7:21, 17:8, 17:17, 27:2, 28:12, 31:9, 34:17

believe [15] - 10:11, 11:9, 13:1, 14:9, 18:18, 18:21, 19:15, 19:25, 20:23, 23:14, 23:15, 23:23, 29:4, 30:9, 38:21

below [1] - 16:15

bench [1] - 34:5

BENNETT [1] - 1:10

best [4] - 13:12, 29:23, 34:20, 42:21

better [1] - 26:1

between [1] - 38:11

bifurcate [6] - 5:17, 22:10, 22:19, 24:20, 24:24, 25:2

bifurcation [4] - 20:17, 21:4, 24:21, 29:3

bit [3] - 8:15, 8:17, 32:11

blame [1] - 41:19

book [1] - 34:5

booked [1] - 35:4

Box [1] - 3:5

Boyd [4] - 1:16, 4:7, 15:20, 33:4

Brawley [1] - 2:1

break [5] - 29:9, 39:8, 40:5, 40:17, 41:7

breaks [1] - 30:13

brief [3] - 30:3, 31:11, 31:12

briefly [1] - 16:3

bring [4] - 28:15, 31:12, 32:25, 35:23

broadly [1] - 16:8

Bryant [2] - 5:3, 39:7

BRYANT [1] - 2:8

bump [2] - 39:2, 39:3

but [41] - 5:11, 5:18, 6:2, 7:24, 8:2, 9:2, 10:12, 10:15, 10:24, 11:9, 12:7, 13:12, 14:6, 15:6, 16:7, 18:1, 19:13, 20:16, 21:10, 21:23, 24:17, 25:24, 26:8, 26:17, 27:4, 27:19, 27:20, 29:4, 29:17, 32:17, 32:21, 33:24, 34:8, 34:19, 34:23, 35:8, 36:11, 37:7, 38:10, 38:12

by [20] - 1:24, 6:11, 8:20, 9:7, 9:24, 10:13, 10:16, 12:1, 12:18, 13:19, 13:24, 17:3, 24:12, 25:19, 27:14, 29:2, 30:11, 36:6, 36:17, 38:8

C

C [2] - 2:18, 4:1

calendar [7] - 30:4, 30:7, 31:3, 32:18, 36:17, 38:25, 41:2

calendars [2] - 40:24, 41:12

Call [1] - 4:2

call [2] - 41:4, 41:23

called [1] - 26:18

came [2] - 5:22, 26:22

can [10] - 13:12, 14:19, 21:14, 29:20, 31:24, 34:9, 35:11, 36:3, 36:10, 41:24

can't [2] - 35:7, 37:12

cannot [3] - 7:24, 11:18, 27:11

career [1] - 7:24

case [47] - 5:11, 5:12, 6:4, 6:22, 7:6, 7:7, 8:11, 8:19, 9:21, 10:11, 12:6, 12:8, 13:12, 13:20, 13:25, 19:5, 20:8, 22:3, 22:9, 23:18, 24:16, 25:25, 26:10, 26:22, 27:4, 27:9, 27:22, 28:7, 28:23, 29:13, 29:21, 29:24, 30:4, 30:21, 30:23, 31:5, 32:4, 33:17, 34:18, 34:19, 37:4, 37:19, 37:20, 38:8, 38:18, 41:24

case-in-chief [1] - 32:4

cases [8] - 6:7, 7:21, 9:8, 30:9, 30:10, 31:17, 37:14

cast [1] - 32:2

catch-22 [1] - 17:15

caught [1] - 21:17

Cause [1] - 4:4

caused [1] - 38:3

CEDELL [1] - 3:5

certain [11] - 5:21, 5:25, 13:21, 13:22, 16:20, 19:11, 19:19, 19:24, 21:20, 23:24, 28:3

certainly [3] - 12:6, 23:22, 34:18

CERTIFICATE [1] - 42:19

certify [1] - 42:21

chance [1] - 28:14

change [1] - 15:22

characterize [1] - 12:15

check [1] - 30:6

chief [2] - 23:9, 32:4

Chief [1] - 23:9

children [3] - 39:10, 40:6, 40:18

choose [1] - 14:12

Christy [1] - 2:15

Christy [3] - 4:18, 6:18, 40:16

Circuit [6] - 10:2, 10:23, 11:1, 26:20, 27:21, 37:12

cited [1] - 24:5

CITY [6] - 1:7, 2:1, 2:15, 2:18, 3:1, 3:5

City [10] - 4:5, 4:12, 4:15, 5:17, 6:21, 16:6, 16:16, 19:17, 22:11, 26:23

City's [1] - 16:12

civil [5] - 7:6, 7:11, 7:21, 12:16, 12:19

claim [7] - 18:17, 18:20, 19:2, 19:3, 19:14, 24:3, 25:3

claims [8] - 18:22, 18:23, 19:10, 19:17,

19:19, 20:1, 20:4, 20:8

clarification [1] - 31:12

cleared [1] - 5:23

clearly [1] - 27:9

Clemente [1] - 4:23

CLEMENTE [1] - 3:2

client's [1] - 38:18

clients [1] - 18:18

CLIFFORD [1] - 1:4

cloaked [1] - 10:16

come [6] - 6:14, 7:7, 20:24, 24:1, 24:23, 30:14

comfortable [1] - 15:12

coming [2] - 13:16, 29:16

comments [2] - 13:17, 23:13

company [1] - 25:17

competing [1] - 13:13

complaint [1] - 18:19

complaints [1] - 19:16

complete [1] - 12:20

complication [2] - 35:9, 35:10

computer [1] - 1:25

concede [1] - 34:23

concern [1] - 14:5

concerning [1] - 5:12

concise [1] - 26:16

conclusion [1] - 34:21

conduct [3] - 27:6, 27:12, 27:18

CONFERENCE [1] - 1:10

conference [5] - 5:8, 35:20, 35:21, 35:22, 36:1

conflict [3] - 39:8, 40:4, 40:17

conflicts [3] - 40:10, 40:14, 40:21

confuse [1] - 24:11

confused [1] - 19:6

connection [2] - 22:16, 22:24

consciously [1] - 23:10

consent [1] - 41:13

consented [1] - 37:23

consider [6] - 12:21, 13:8, 15:6, 21:23, 35:13, 39:16

considerable [1] - 38:20

consideration [4] - 17:18, 20:16, 29:3, 29:12

considering [1] - 20:22

consistent [1] - 10:23

conspiracy [2] - 19:1, 19:13

conspire [1] - 19:16

constitutional [6] - 22:12, 22:16, 22:23, 23:8, 24:12, 25:9

context [1] - 19:17

continuance [2] - 9:24, 41:18

continue [1] - 12:7

control [3] - 14:1, 29:17, 31:25

conversely [1] - 23:3

correct [6] - 17:5, 19:11, 19:20, 25:14, 32:24, 42:21

correctly [2] - 12:13, 32:12

corruption [1] - 27:11

costs [1] - 26:19
could [11] - 6:25, 8:25, 9:1, 13:13, 24:22, 25:6, 25:24, 27:15, 27:21, 31:3, 37:5
couldn't [2] - 29:7, 29:9
counsel [16] - 4:6, 5:7, 6:17, 11:12, 17:14, 31:14, 33:3, 39:20, 40:1, 40:4, 40:8, 40:12, 42:2, 42:5, 42:7, 42:16
counselor [6] - 8:9, 9:11, 15:18, 19:6, 26:4, 39:5
County [2] - 6:12, 13:2
couple [4] - 30:3, 30:9, 35:2, 36:1
course [3] - 10:1, 37:17, 38:3
Court [64] - 3:8, 3:9, 3:9, 6:1, 6:2, 8:7, 9:22, 9:25, 10:5, 10:20, 11:20, 12:2, 12:3, 13:7, 13:18, 13:25, 14:19, 16:17, 16:21, 16:23, 17:11, 17:13, 17:16, 18:2, 18:9, 18:10, 18:21, 19:4, 21:19, 22:7, 22:8, 22:10, 22:20, 23:1, 23:3, 23:6, 25:5, 25:22, 26:9, 26:25, 29:8, 30:3, 30:8, 33:10, 33:13, 34:24, 35:11, 35:13, 35:16, 35:17, 36:12, 37:18, 38:15, 38:21, 39:16, 39:23, 41:8, 41:25, 42:20, 42:24
court [5] - 4:2, 13:11, 33:9, 34:25, 37:6
COURT [77] - 1:1, 4:3, 4:16, 5:5, 5:7, 6:14, 6:24, 7:2, 7:23, 8:9, 9:11, 9:13, 11:7, 11:11, 11:14, 11:23, 12:12, 14:24, 15:8, 15:16, 15:18, 16:1, 16:3, 16:18, 17:7, 18:3, 18:14, 18:23, 19:6, 19:8, 19:13, 19:18, 19:21, 19:24, 20:7, 20:11, 20:13, 20:15, 23:12, 25:12, 25:16, 26:3, 27:25, 32:12, 32:15, 32:22, 32:25, 33:2, 33:8, 33:12, 33:15, 33:18, 33:23, 34:3, 34:7, 34:13, 35:25, 38:7, 38:19, 38:24, 39:2, 39:11, 39:14, 39:18, 39:20, 39:25, 40:5, 40:7, 40:11, 40:15, 40:19, 40:22, 40:24, 41:15, 42:5, 42:7, 42:15
Court's [13] - 11:21, 12:2, 14:1, 17:23, 22:3, 22:5, 29:5, 29:23, 30:11, 31:3, 31:16, 36:10, 41:2
courtroom [1] - 13:3
courts [2] - 14:15, 14:17
Cousin [1] - 37:22
cover [1] - 35:19
coverage [1] - 30:22
covered [1] - 21:2
crazy [1] - 37:7
created [1] - 12:18
creates [1] - 13:3
criminal [26] - 5:13, 6:6, 6:7, 7:6, 7:13, 7:21, 9:4, 9:8, 12:8, 12:17, 12:23, 12:25, 14:20, 14:22, 16:7, 16:10, 21:2, 23:21, 23:23, 24:18, 27:4, 27:9, 27:22, 29:16, 37:2, 37:25
criminally [1] - 7:12
critical [1] - 13:22
cross [3] - 31:25, 37:18, 38:20
cross-examination [3] - 31:25, 37:18, 38:20

CRR [2] - 3:8, 42:20
CSR [2] - 3:8, 42:20
current [1] - 35:20
currently [1] - 41:10
custom [4] - 22:13, 23:8, 23:11, 23:19
customs [1] - 24:10

D

D [1] - 4:1
DA [1] - 7:14
DA's [1] - 7:7
Dallas [1] - 36:23
dangers [1] - 23:10
date [4] - 14:23, 17:24, 32:19, 32:20
dates [1] - 32:18
David [3] - 2:8, 5:3, 39:7
DAWSON [10] - 4:12, 16:2, 16:4, 21:25, 23:22, 25:15, 25:21, 34:15, 39:21, 42:8
Dawson [6] - 2:1, 4:12, 20:23, 26:3, 34:13, 40:20
Day [3] - 2:21, 5:1, 39:21
DAY [2] - 5:1, 42:11
day [12] - 14:3, 17:9, 22:22, 30:13, 30:15, 30:18, 30:22, 30:23, 31:22, 36:2, 37:1, 41:6
days [6] - 18:6, 29:1, 30:17, 30:20, 31:21, 32:4
deadline [1] - 41:21
deadlines [1] - 36:8
dealing [1] - 30:13
death [1] - 38:4
deaths [2] - 10:15, 12:9
deceased [1] - 10:15
decide [1] - 35:6
decided [1] - 19:1
decides [1] - 10:20
decision [5] - 8:7, 9:24, 20:7, 29:18, 29:21
DEFENDANT [4] - 2:1, 2:8, 2:11, 2:21
defendant [6] - 8:11, 15:9, 18:24, 37:14, 38:15
DEFENDANTS [4] - 2:15, 2:18, 3:1, 3:4
defendants [29] - 5:21, 6:1, 6:8, 6:22, 8:13, 8:14, 9:4, 9:13, 11:24, 12:3, 12:16, 12:22, 13:15, 13:19, 14:10, 14:25, 15:14, 15:22, 16:10, 16:20, 17:8, 18:4, 18:19, 18:22, 19:11, 19:19, 37:14, 37:16
defense [1] - 42:7
defense's [1] - 37:19
defenses [3] - 17:24, 18:6, 18:7
defined [1] - 12:1
delay [1] - 12:10
deliberations [3] - 30:18, 30:20, 31:2
denied [1] - 41:17
denies [1] - 22:20
Denny [1] - 41:19

Department [2] - 24:11, 27:23
depend [1] - 22:3
depending [5] - 21:19, 25:5, 25:10, 31:6, 35:19
deposition [1] - 10:7
depositions [5] - 7:8, 15:24, 26:16, 32:3, 33:11
DEPT [1] - 3:5
deserves [1] - 11:9
desire [1] - 29:21
determination [1] - 25:9
determine [2] - 9:1, 9:3
deterrence [1] - 25:19
developed [2] - 7:11, 8:19
developments [1] - 5:11
did [14] - 6:20, 7:15, 9:7, 9:17, 9:19, 10:13, 10:14, 10:16, 16:14, 19:14, 21:6, 24:19, 33:7, 35:8
didn't [5] - 16:22, 29:15, 37:23, 38:6
difficult [1] - 9:2
dire [3] - 24:16, 31:22, 34:21
direct [2] - 14:8, 32:1
directly [2] - 26:20, 27:24
discovery [1] - 13:14
discretion [3] - 17:23, 25:14, 26:21
discuss [1] - 20:17
discussed [1] - 21:5
discussion [2] - 23:14, 40:23
disfavored [1] - 26:24
dismissed [1] - 18:17
dispose [1] - 19:5
DISTRICT [3] - 1:1, 1:1, 1:11
District [4] - 3:9, 3:10, 42:20
district [3] - 6:12, 7:9, 13:2
DIVISION [1] - 1:2
do [39] - 9:19, 10:11, 12:7, 13:24, 16:5, 17:2, 17:16, 17:22, 18:1, 18:16, 19:21, 20:4, 20:20, 21:24, 25:16, 26:18, 28:9, 28:24, 29:3, 29:4, 29:8, 29:11, 29:22, 30:2, 30:7, 31:1, 31:5, 31:12, 31:13, 31:24, 33:24, 34:22, 36:7, 36:23, 38:10, 38:11, 42:21
docket [2] - 41:4, 41:23
does [8] - 16:11, 16:16, 20:16, 23:3, 27:3, 28:5, 30:4, 39:18
doesn't [4] - 15:22, 22:18, 23:1, 24:20
doing [2] - 29:19, 38:25
don't [25] - 8:25, 9:3, 9:18, 10:4, 13:11, 14:9, 14:10, 17:24, 18:21, 19:15, 19:17, 19:24, 24:17, 26:17, 27:16, 27:19, 29:7, 34:24, 35:25, 36:12, 37:10, 41:12, 41:15, 41:16
done [5] - 7:14, 9:22, 13:25, 14:18
down [1] - 31:23
Doyle [7] - 1:21, 4:11, 11:15, 26:5, 31:15, 33:5, 42:3
DOYLE [17] - 1:22, 4:11, 11:13, 11:15, 11:25, 13:24, 15:6, 15:13, 15:17, 17:6, 26:5, 31:15, 32:14, 32:16, 32:24, 33:1,

<p>42:3 Doyle's ^[1] - 34:17 drafted ^[1] - 16:8 drive ^[3] - 33:24, 33:25, 34:7 during ^[3] - 13:3, 30:14, 33:20 Dwayne ^[3] - 2:21, 5:1, 39:21</p>	<p>exactly ^[1] - 9:1 examination ^[3] - 31:25, 37:18, 38:20 example ^[1] - 9:7 except ^[2] - 18:18, 37:25 exceptionally ^[1] - 22:6 excessive ^[8] - 18:20, 22:21, 23:4, 24:3, 25:3, 25:5, 27:15, 38:5 exclude ^[1] - 8:24 excuse ^[1] - 25:1 excused ^[1] - 42:16 exhibit ^[3] - 33:20, 35:15, 36:8 exhibits ^[3] - 33:14, 33:16, 34:9 experience ^[2] - 30:11, 34:19 explain ^[3] - 6:25, 33:18, 34:24 expressions ^[1] - 34:17 extensive ^[1] - 23:14 extensively ^[1] - 21:3</p>	<p>filings ^[1] - 6:1 final ^[2] - 28:14, 31:9 find ^[2] - 17:7, 38:16 fine ^[4] - 6:16, 35:11, 36:5, 36:15 fire ^[1] - 41:18 FIRM ^[1] - 2:5 firm ^[1] - 41:21 first ^[5] - 5:25, 6:10, 8:3, 19:2, 24:24 five ^[2] - 26:1, 34:16 flip ^[1] - 24:7 flood ^[1] - 27:8 Floor ^[3] - 2:16, 2:19, 3:2 focused ^[2] - 27:10, 27:13 folks ^[3] - 6:21, 12:10, 32:17 following ^[2] - 16:6, 39:13 for ^[92] - 4:6, 4:7, 4:9, 4:11, 4:12, 4:14, 4:18, 4:20, 4:22, 4:24, 5:1, 5:3, 5:4, 5:7, 5:8, 5:21, 6:17, 6:18, 7:6, 8:3, 8:7, 8:13, 9:3, 9:24, 10:2, 10:9, 11:1, 11:12, 11:15, 12:10, 12:19, 12:20, 13:8, 14:4, 14:11, 15:14, 15:20, 17:3, 17:8, 17:14, 17:17, 17:18, 17:20, 17:25, 18:4, 18:18, 18:21, 18:25, 19:2, 19:4, 20:4, 20:15, 20:17, 20:25, 21:2, 21:4, 21:19, 24:1, 24:9, 25:4, 25:23, 25:24, 26:5, 26:11, 26:24, 27:6, 28:18, 30:17, 31:3, 31:22, 32:4, 32:19, 32:20, 33:4, 33:7, 34:5, 34:20, 35:14, 35:16, 35:20, 36:18, 37:6, 37:24, 37:25, 38:18, 39:7, 41:18, 42:2, 42:7, 42:15 FOR ^[10] - 1:16, 1:21, 2:1, 2:8, 2:11, 2:15, 2:18, 2:21, 3:1, 3:4 force ^[10] - 18:20, 22:21, 22:23, 22:24, 23:4, 24:3, 25:3, 25:5, 27:15, 38:5 foregoing ^[1] - 42:21 forest ^[1] - 34:4 forever ^[3] - 12:10, 14:18, 14:19 forgot ^[1] - 37:1 forthcoming ^[1] - 15:2 forward ^[5] - 5:19, 12:19, 15:4, 15:25, 29:13 found ^[2] - 9:8, 9:10 four ^[4] - 10:17, 30:17, 32:13, 37:14 frames ^[1] - 30:25 FRANK ^[1] - 2:15 Frank ^[1] - 6:18 frankly ^[2] - 22:6, 22:17 free ^[1] - 30:7 freely ^[1] - 20:18 frequent ^[1] - 28:11 Friday ^[3] - 6:20, 6:25, 35:21 from ^[17] - 6:10, 6:25, 9:13, 9:18, 12:10, 13:17, 13:18, 13:21, 14:15, 15:2, 15:21, 17:9, 23:6, 31:2, 34:20, 37:12, 42:22 full ^[7] - 12:19, 12:20, 13:7, 14:10, 26:8, 33:11, 33:14 fully ^[1] - 13:24 further ^[6] - 16:22, 17:13, 17:16, 18:10, 26:12, 42:4</p>
<p style="text-align: center;">E</p>		
<p>E ^[3] - 3:1, 4:1 each ^[1] - 12:5 earlier ^[3] - 13:15, 23:13, 41:17 early ^[1] - 28:25 earth ^[1] - 41:11 earth-shattering ^[1] - 41:11 easiest ^[1] - 33:24 easily ^[1] - 27:15 East ^[1] - 34:4 Edwards ^[1] - 41:1 efficiencies ^[1] - 38:16 efficiency ^[4] - 21:10, 21:12, 25:19, 36:10 efficient ^[6] - 24:22, 28:5, 28:9, 28:12, 31:18, 34:18 efficiently ^[1] - 28:19 either ^[5] - 6:14, 8:21, 9:8, 9:21, 38:13 either/or ^[1] - 6:15 elaborate ^[1] - 8:15 elementary ^[1] - 39:10 else ^[10] - 8:10, 9:13, 11:11, 20:13, 28:15, 29:18, 31:12, 32:25, 42:2, 42:7 enabled ^[1] - 23:8 end ^[7] - 7:15, 7:19, 14:3, 14:23, 29:16, 30:4, 39:1 engaged ^[1] - 23:15 enjoy ^[1] - 25:17 enough ^[2] - 11:3, 41:8 entangling ^[1] - 27:22 enticing ^[1] - 26:11 entire ^[4] - 7:2, 7:25, 8:3, 17:1 entirely ^[2] - 9:10, 25:14 entirety ^[1] - 19:5 entitled ^[2] - 29:4, 42:22 ERIC ^[1] - 3:5 establish ^[1] - 24:6 estimate ^[5] - 30:9, 32:11, 34:16, 34:17, 34:20 estimated ^[1] - 37:4 ET ^[2] - 1:4, 1:7 et ^[2] - 4:4, 4:5 even ^[2] - 14:25, 34:8 ever ^[1] - 14:9 every ^[4] - 30:17, 32:7, 38:21 everybody ^[2] - 14:4, 37:25 everybody's ^[1] - 10:13 everything ^[1] - 37:22 evidence ^[12] - 8:19, 8:22, 8:25, 11:17, 24:18, 25:11, 29:14, 30:12, 30:15, 30:17, 31:22</p>	<p style="text-align: center;">F</p>	<p>F ^[1] - 1:4 face ^[1] - 12:16 faced ^[1] - 12:23 facing ^[2] - 12:22, 14:25 fact ^[8] - 6:3, 12:7, 14:8, 17:2, 19:14, 24:17, 25:18, 27:21 facts ^[7] - 12:20, 13:8, 13:21, 13:22, 16:12, 21:3, 21:4 factual ^[2] - 26:13, 27:2 fair ^[4] - 8:5, 9:4, 11:25, 26:22 fairer ^[1] - 26:1 fairly ^[5] - 22:25, 26:16, 26:20, 27:7 faith ^[1] - 14:21 fall ^[1] - 38:13 falls ^[1] - 17:11 false ^[4] - 23:16, 23:25, 24:19, 38:2 family ^[2] - 4:11, 11:15 fast ^[1] - 33:19 February ^[3] - 31:6, 32:19, 32:22 federal ^[1] - 9:8 feedback ^[1] - 21:23 feel ^[1] - 30:7 feet ^[1] - 41:18 Felipe ^[1] - 5:4 FELIPE ^[1] - 2:12 felony ^[1] - 38:2 few ^[1] - 28:19 Fifth ^[24] - 6:6, 10:2, 10:6, 10:10, 10:23, 11:1, 11:22, 12:3, 12:15, 13:5, 13:6, 13:18, 14:7, 14:12, 14:14, 14:16, 15:1, 15:5, 15:10, 15:24, 16:10, 26:20, 27:21, 37:12 figure ^[1] - 29:22 file ^[8] - 6:20, 8:7, 16:22, 17:2, 18:5, 19:25, 20:1, 20:21 filed ^[13] - 5:20, 6:22, 8:6, 11:20, 16:21, 17:1, 17:10, 18:25, 19:3, 20:4, 20:19, 29:6, 32:8 filing ^[4] - 6:24, 8:1, 18:16, 25:13</p>

Further ^[1] - 18:9		
G		
G ^[1] - 4:1 GALLEGOS ^[1] - 2:12 Gallegos ^[5] - 5:4, 9:16, 11:17, 12:5, 36:19 Garcia ^[3] - 3:1, 4:22, 40:9 GARCIA ^[3] - 4:22, 40:9, 42:13 Garrett ^[1] - 2:1 Garrity ^[3] - 8:18, 8:20, 8:22 Garrity-protected ^[1] - 8:22 Gerald ^[2] - 5:2, 39:22 GERALD ^[1] - 2:22 get ^[21] - 5:14, 5:16, 5:23, 7:7, 14:9, 15:14, 21:23, 22:11, 22:12, 24:16, 26:14, 26:17, 29:5, 29:7, 29:9, 29:25, 30:12, 35:8, 35:22, 37:10, 41:24 gets ^[2] - 15:6, 22:3 getting ^[2] - 13:13, 37:12 give ^[12] - 19:8, 20:20, 22:8, 26:8, 27:7, 28:14, 28:25, 29:10, 29:12, 30:8, 31:13, 41:21 gives ^[2] - 41:8, 42:1 giving ^[1] - 36:7 go ^[16] - 7:21, 10:7, 10:25, 12:18, 14:6, 14:19, 23:17, 32:2, 32:4, 32:6, 32:7, 34:7, 35:3, 35:7, 36:3, 36:16 goes ^[1] - 23:7 Goines ^[9] - 5:2, 7:15, 21:2, 23:13, 23:15, 23:25, 24:19, 37:25, 39:22 GOINES ^[1] - 2:22 going ^[42] - 5:14, 7:4, 7:8, 7:11, 7:16, 7:19, 10:2, 10:3, 10:20, 11:1, 11:2, 12:23, 15:14, 18:1, 19:8, 20:19, 21:8, 21:24, 24:8, 24:16, 25:18, 28:3, 28:5, 28:8, 28:20, 28:23, 30:2, 30:16, 30:18, 30:19, 30:21, 31:7, 32:7, 34:23, 35:3, 35:23, 36:1, 37:8, 38:11, 38:14, 41:5 gone ^[2] - 10:4, 41:2 Gonzales ^[2] - 4:18, 18:19 GONZALES ^[1] - 2:16 good ^[11] - 4:3, 4:7, 4:9, 4:14, 4:18, 4:24, 5:1, 8:12, 9:15, 14:21, 39:6 got ^[3] - 31:23, 33:1, 33:16 grant ^[4] - 11:3, 17:8, 23:1, 23:3 granted ^[1] - 11:20 guess ^[2] - 26:7, 39:12 guessed ^[1] - 26:7 guesses ^[1] - 36:22 guesstimate ^[1] - 32:5 guidelines ^[1] - 30:25 guy ^[2] - 10:12, 10:13 guys ^[1] - 9:19	23:22, 26:18, 35:20, 38:15 half ^[2] - 30:12, 34:4 Hanen ^[2] - 37:1, 39:3 Hanen's ^[1] - 37:6 happen ^[1] - 37:23 happened ^[2] - 11:18, 22:21 happening ^[1] - 38:1 happens ^[2] - 22:2, 33:19 happy ^[3] - 25:17, 25:23, 34:7 hard ^[3] - 13:12, 28:23, 33:19 hard-and-fast ^[1] - 33:19 Hardin ^[7] - 2:11, 5:4, 9:15, 11:16, 36:17, 36:18, 38:7 HARDIN ^[9] - 2:12, 5:4, 9:15, 11:8, 36:18, 38:17, 38:20, 38:25, 42:9 Harding ^[2] - 10:11, 22:22 Harold ^[1] - 2:4 Harris ^[2] - 6:12, 13:2 has ^[23] - 5:17, 6:1, 6:3, 7:20, 10:10, 12:3, 13:25, 17:3, 22:11, 24:14, 26:20, 29:8, 30:11, 35:7, 35:10, 36:12, 37:2, 38:15, 38:21, 41:1, 41:25 have ^[99] - 5:11, 5:18, 6:3, 6:11, 7:4, 7:9, 7:18, 9:1, 9:8, 9:18, 9:19, 9:22, 10:4, 12:8, 12:14, 13:12, 14:2, 14:3, 14:6, 14:15, 14:17, 14:20, 14:23, 15:24, 16:5, 16:10, 16:16, 16:20, 16:22, 16:25, 17:2, 17:3, 17:4, 17:9, 17:24, 17:25, 18:4, 18:16, 18:17, 18:23, 19:1, 19:19, 20:3, 20:4, 20:8, 20:18, 20:24, 21:13, 22:8, 22:15, 23:4, 23:21, 23:22, 24:24, 24:25, 25:2, 25:17, 25:23, 25:25, 26:14, 27:1, 27:17, 28:10, 28:11, 28:22, 29:2, 30:9, 30:16, 30:18, 30:19, 31:3, 31:10, 31:11, 32:16, 32:20, 33:5, 33:7, 33:24, 33:25, 34:8, 34:22, 35:4, 35:7, 35:10, 35:17, 36:2, 36:21, 37:21, 37:22, 37:23, 39:1, 39:23, 40:6, 40:17, 40:21, 41:9, 41:18 haven't ^[1] - 17:10 having ^[13] - 6:7, 10:18, 13:14, 13:17, 13:21, 15:9, 16:21, 21:12, 25:19, 31:17, 33:9, 35:6, 38:14 he ^[5] - 10:13, 10:21, 11:16, 11:19, 41:19 he's ^[5] - 10:12, 10:13, 10:14, 10:16 head ^[1] - 17:6 hear ^[14] - 6:10, 7:17, 13:22, 21:21, 22:19, 22:21, 24:8, 25:8, 25:10, 25:24, 25:25, 38:7, 38:8, 41:15 HEARD ^[1] - 1:10 heard ^[7] - 7:13, 7:18, 9:14, 13:11, 13:17, 16:2, 20:13 hearing ^[3] - 15:11, 20:25, 32:12 hearings ^[2] - 9:1, 16:24 heart ^[1] - 37:19 Heights ^[1] - 2:9 helpful ^[1] - 34:11 helps ^[2] - 31:19 her ^[1] - 36:24	here ^[20] - 4:11, 5:1, 7:7, 11:15, 11:24, 16:25, 18:24, 20:19, 25:17, 25:23, 26:5, 28:2, 29:19, 31:10, 31:11, 33:23, 34:1, 37:3, 38:1 here's ^[1] - 26:10 hereby ^[2] - 18:5, 42:21 hey ^[2] - 26:9, 26:10 highly ^[1] - 7:5 him ^[1] - 41:21 his ^[3] - 9:18, 9:21, 33:6 HISD ^[1] - 39:8 hold ^[2] - 20:19, 28:23 Honor ^[39] - 4:7, 4:9, 4:13, 4:14, 8:12, 9:12, 9:15, 15:19, 16:2, 16:4, 17:20, 18:13, 18:16, 19:23, 20:6, 20:10, 22:1, 24:4, 25:8, 25:22, 31:15, 32:24, 33:4, 33:7, 34:12, 34:15, 35:6, 36:18, 38:17, 39:6, 40:2, 42:6, 42:8, 42:9, 42:10, 42:11, 42:12, 42:13, 42:14 HONORABLE ^[1] - 1:10 hope ^[4] - 7:17, 31:7, 34:18, 41:10 hopefully ^[2] - 28:19, 31:22 hopes ^[1] - 9:22 hours ^[5] - 30:12, 30:15, 30:16, 32:7, 36:1 house ^[2] - 11:18, 21:7 HOUSTON ^[8] - 1:2, 1:7, 1:5, 2:1, 2:15, 2:18, 3:1, 3:5 Houston ^[18] - 1:18, 1:23, 2:3, 2:6, 2:10, 2:13, 2:16, 2:19, 2:23, 3:2, 3:6, 3:11, 4:5, 4:12, 4:15, 16:6, 24:10, 27:23 how ^[12] - 5:16, 5:18, 10:24, 14:11, 16:13, 21:11, 21:19, 24:16, 24:22, 25:5, 26:9, 37:8 however ^[2] - 12:15, 25:23
H		
H ^[1] - 1:10 had ^[9] - 5:20, 7:7, 18:20, 23:15, 23:20,		I ^[194] - 4:1, 5:8, 5:13, 5:15, 5:22, 6:5, 6:24, 7:17, 7:24, 8:5, 8:14, 8:15, 8:25, 9:3, 9:7, 9:8, 9:10, 11:5, 11:6, 11:9, 11:16, 12:13, 12:14, 13:1, 13:10, 13:11, 13:12, 13:13, 13:24, 14:5, 14:9, 14:10, 14:11, 14:17, 14:18, 14:24, 15:13, 16:2, 16:5, 16:16, 17:4, 17:7, 17:22, 18:1, 18:8, 18:13, 20:17, 20:18, 20:23, 20:24, 21:7, 21:17, 21:23, 22:15, 23:12, 23:14, 23:23, 24:14, 24:17, 24:23, 25:6, 25:7, 25:16, 25:21, 25:22, 26:7, 26:11, 26:14, 26:17, 26:21, 27:4, 27:16, 27:19, 27:20, 28:1, 28:4, 28:11, 28:17, 28:22, 28:24, 29:3, 29:4, 29:7, 29:11, 29:12, 29:15, 29:20, 29:23, 29:25, 30:9, 30:10, 30:17, 30:21, 30:24, 31:3, 31:5, 31:7, 31:11, 31:13, 31:16, 31:17, 31:18, 31:19, 31:21, 31:23, 31:24, 32:6, 32:8, 32:14, 32:20, 33:1, 33:5, 33:6, 33:9, 33:21, 33:24, 34:8, 34:9, 34:16, 34:17, 34:18, 34:22, 35:2, 35:4, 35:7, 35:8, 35:10, 35:12, 35:18, 35:21, 35:23, 35:25, 36:1,

36:5, 36:7, 36:20, 36:21, 36:22, 36:24, 37:1, 37:7, 37:12, 37:19, 38:7, 38:10, 38:11, 38:12, 38:13, 38:17, 38:18, 38:19, 38:22, 39:2, 39:9, 39:12, 39:15, 39:16, 39:23, 40:6, 40:17, 40:20, 40:21, 41:10, 41:12, 41:13, 41:15, 41:16, 41:17, 41:20, 42:20

I'd [3] - 16:4, 29:22, 34:23

I'll [13] - 8:1, 10:5, 20:7, 20:20, 21:21, 21:25, 24:4, 28:14, 31:13, 34:7, 38:8, 39:1, 39:3

I'm [31] - 5:14, 7:23, 14:22, 15:8, 15:9, 16:6, 16:7, 17:15, 19:6, 19:8, 20:19, 21:11, 21:23, 24:21, 27:15, 29:8, 29:17, 30:2, 31:24, 32:2, 32:12, 34:5, 34:23, 35:3, 36:11, 38:10, 38:25, 39:2, 39:3

I've [9] - 6:24, 29:20, 31:10, 31:17, 31:22, 32:3, 37:13, 37:15, 41:21

IAD [1] - 8:21

idea [3] - 22:9, 27:2, 37:19

identify [1] - 6:17

if [63] - 4:17, 6:23, 7:5, 7:9, 7:19, 9:5, 10:1, 10:2, 10:4, 10:19, 10:21, 10:23, 10:24, 11:3, 11:9, 12:18, 13:1, 13:6, 14:6, 15:2, 17:22, 18:6, 18:23, 19:24, 19:25, 21:14, 22:10, 22:19, 23:3, 24:7, 24:12, 24:23, 25:2, 25:24, 26:18, 27:7, 29:22, 29:24, 29:25, 30:3, 30:6, 30:18, 31:10, 32:2, 32:6, 32:12, 32:19, 33:23, 33:24, 34:1, 34:3, 34:24, 35:6, 35:12, 36:10, 37:10, 37:11, 38:18, 41:18, 41:20

Ill [1] - 2:4

illegal [1] - 27:18

imagine [1] - 37:13

immunity [3] - 9:23, 10:17, 10:25

impact [10] - 5:18, 6:4, 6:8, 7:3, 12:24, 16:5, 16:16, 20:16, 35:17, 39:16

impacted [2] - 14:2, 29:18

impacts [1] - 21:15

impede [1] - 16:12

implicated [1] - 14:4

implication [3] - 14:8, 14:16, 15:7

implications [1] - 26:25

important [4] - 17:25, 29:5, 35:8, 37:24

impression [1] - 8:3

in [123] - 5:11, 5:25, 6:21, 6:22, 7:10, 7:11, 7:23, 7:24, 8:11, 8:19, 9:17, 9:21, 9:22, 10:15, 12:6, 12:16, 12:19, 13:2, 13:11, 13:13, 13:19, 14:21, 15:4, 15:24, 16:6, 17:7, 17:9, 17:12, 17:14, 17:15, 17:17, 18:7, 18:9, 19:14, 19:16, 20:22, 20:25, 21:1, 21:3, 21:15, 21:6, 21:8, 21:13, 22:10, 22:16, 22:19, 22:24, 23:13, 23:15, 23:16, 23:17, 23:20, 23:21, 23:23, 23:24, 24:1, 24:5, 24:15, 24:16, 24:18, 25:4, 25:13, 25:25, 26:1, 26:8, 26:22, 27:1, 27:6, 27:9, 27:12, 27:18, 27:24, 28:5, 28:9, 28:25, 29:17,

30:8, 30:16, 30:21, 30:25, 31:5, 31:18, 31:21, 31:24, 32:4, 32:18, 33:16, 33:20, 33:25, 34:8, 34:15, 34:19, 34:22, 35:1, 35:19, 35:22, 36:2, 36:9, 36:13, 36:21, 36:23, 36:25, 37:6, 37:7, 37:10, 37:11, 37:13, 37:15, 37:20, 38:10, 38:13, 42:22

included [1] - 18:7

including [3] - 12:5, 26:12, 31:23

indicted [5] - 7:12, 8:10, 9:4, 11:24, 15:23

indictment [3] - 7:13, 7:20, 12:23

indictments [5] - 6:7, 10:19, 16:5, 16:8, 29:13

indifferent [1] - 23:10

individual [2] - 16:9, 24:12

individuals [1] - 6:11

inform [1] - 36:22

information [5] - 5:14, 8:18, 9:5, 13:14, 23:16

initial [1] - 21:4

inside [1] - 11:18

instance [4] - 7:25, 21:13, 27:2, 34:8

instances [2] - 23:24, 24:19

instructed [1] - 16:15

intend [1] - 18:6

interest [1] - 31:18

interests [1] - 13:13

international [1] - 35:4

interspersed [1] - 8:18

into [6] - 6:14, 10:7, 11:5, 22:12, 23:7, 32:4

introduce [1] - 33:20

investigator [1] - 8:21

invite [1] - 30:2

irrelevant [1] - 38:1

is [91] - 4:17, 5:18, 5:22, 6:3, 6:23, 7:12, 7:14, 7:18, 7:19, 8:6, 8:17, 8:18, 8:22, 9:5, 9:20, 10:12, 11:22, 11:23, 12:2, 12:10, 12:18, 13:2, 13:16, 14:4, 14:5, 14:6, 14:25, 15:21, 17:16, 17:17, 18:2, 18:10, 18:20, 18:24, 19:11, 19:12, 19:18, 20:15, 20:17, 20:23, 21:18, 22:21, 23:4, 24:8, 24:23, 25:8, 25:13, 25:15, 25:18, 25:22, 26:7, 26:9, 26:13, 26:25, 27:24, 28:2, 28:3, 29:24, 30:2, 32:21, 32:22, 33:20, 34:18, 34:25, 35:5, 35:8, 35:9, 35:11, 35:14, 35:18, 35:23, 36:13, 36:23, 37:2, 37:4, 37:6, 37:8, 37:17, 37:21, 37:22, 37:25, 38:20, 39:8, 39:9, 39:13, 39:23, 40:4, 41:1, 42:21

issuance [1] - 22:17

issue [18] - 10:4, 10:8, 11:12, 11:13, 12:1, 12:24, 16:19, 18:11, 18:16, 20:13, 20:15, 22:17, 22:25, 24:15, 27:2, 28:14, 29:13, 34:23

issues [11] - 14:14, 21:14, 28:16, 29:2, 30:3, 33:1, 35:13, 39:23, 41:7, 41:9, 41:11

it [76] - 5:8, 6:3, 7:19, 8:6, 8:25, 9:2,

9:18, 9:20, 9:22, 10:16, 10:21, 12:15, 13:3, 13:7, 14:18, 15:9, 16:11, 16:16, 17:12, 18:2, 19:15, 19:21, 20:17, 21:1, 22:5, 24:2, 24:7, 24:8, 24:22, 24:24, 25:1, 25:6, 25:7, 25:11, 25:15, 26:10, 26:16, 26:18, 27:3, 27:8, 27:10, 27:22, 28:4, 28:5, 28:9, 30:11, 31:4, 31:23, 31:25, 32:3, 33:1, 33:21, 33:25, 34:1, 34:3, 34:18, 34:24, 35:7, 35:8, 35:14, 36:20, 37:5, 37:13, 37:23, 38:3, 38:4, 38:5, 38:12, 39:1, 39:4, 39:16, 39:18, 41:25

it's [28] - 4:17, 7:5, 8:21, 9:3, 10:24, 11:4, 14:7, 18:21, 21:22, 23:24, 24:14, 26:21, 26:23, 27:13, 27:14, 27:16, 28:10, 28:23, 29:17, 29:18, 29:21, 30:14, 30:21, 33:18, 37:24, 38:11, 38:14, 40:5

its [1] - 17:12

J

JACKSON [1] - 1:17

January [4] - 31:5, 32:19, 35:1, 36:25

Jasper [1] - 26:23

Jeff [3] - 1:21, 4:9, 17:20

JOHN [1] - 1:21

join [2] - 9:17, 9:18

Jr [1] - 2:11

Judge [9] - 5:1, 36:23, 37:1, 37:6, 39:3, 39:21, 40:20, 41:14

JUDGE [1] - 1:11

judge [3] - 27:9, 28:3, 41:20

judgment [12] - 5:21, 11:17, 17:4, 17:8, 17:18, 18:25, 19:4, 20:5, 23:2, 23:4, 28:18, 35:16

judicial [4] - 21:10, 21:12, 25:19, 26:19

June [1] - 36:23

jurisprudence [1] - 27:21

jurors [2] - 31:19, 39:17

jury [21] - 12:21, 13:8, 13:22, 14:4, 15:6, 16:12, 21:14, 21:16, 24:8, 24:11, 25:8, 25:21, 25:24, 26:1, 27:1, 27:2, 30:22, 30:23, 30:24, 31:2

jury's [3] - 28:8, 29:24, 30:13

just [27] - 4:16, 8:2, 8:6, 8:15, 11:12, 14:8, 14:10, 16:4, 16:16, 17:10, 22:7, 22:8, 24:21, 25:6, 27:13, 27:21, 28:25, 30:10, 30:13, 32:3, 34:16, 34:19, 35:22, 35:23, 36:3, 37:12, 38:17

K

keep [2] - 27:10, 41:18

key [3] - 13:22, 34:9, 34:10

kill [1] - 34:4

kind [7] - 17:15, 21:21, 23:12, 24:23, 30:25, 38:10, 38:13

knew [1] - 38:6

knock [1] - 36:3

<p>know [20] - 5:8, 6:5, 7:9, 7:15, 7:17, 10:3, 11:3, 14:11, 18:1, 25:22, 28:10, 28:24, 31:17, 32:16, 36:20, 36:23, 37:22, 38:2, 38:6, 41:17</p> <p>knowing [1] - 13:20</p> <p>knows [4] - 22:7, 22:10, 23:6, 37:18</p>	<p>33:21, 34:10, 41:2, 41:12</p> <p>looking [5] - 22:6, 26:15, 31:6, 32:18, 41:1</p> <p>looks [1] - 40:25</p> <p>lot [7] - 14:1, 21:3, 22:2, 26:19, 32:3, 32:17</p> <p>LOVINGS [1] - 3:5</p> <p>Lovings [2] - 4:20, 8:13</p> <p>lunch [1] - 30:13</p> <p>Lynn [2] - 36:23, 39:3</p>	<p>microphone [1] - 6:15</p> <p>mid [1] - 29:10</p> <p>mid-March [1] - 29:10</p> <p>middle [1] - 38:14</p> <p>Midland [2] - 36:25, 37:4</p> <p>might [5] - 5:16, 14:20, 28:1, 34:10, 34:18</p> <p>Mike [5] - 4:11, 11:15, 26:5, 31:15, 42:3</p> <p>mind [1] - 34:24</p> <p>mine [1] - 39:8</p> <p>minimum [1] - 30:23</p> <p>minor [1] - 33:7</p> <p>minutes [2] - 32:6, 32:10</p> <p>misled [1] - 38:22</p> <p>misspoke [1] - 11:16</p> <p>moment [1] - 4:16</p> <p>Monday [2] - 30:10, 39:13</p> <p>Monell [9] - 22:11, 22:13, 23:5, 23:7, 24:1, 24:6, 24:9, 25:4, 25:11</p> <p>money [1] - 26:19</p> <p>month [4] - 21:24, 22:2, 22:7, 25:18</p> <p>moot [4] - 17:23, 18:2, 18:20, 34:25</p> <p>more [9] - 5:14, 8:17, 22:7, 24:22, 25:6, 26:20, 35:8, 37:14, 41:8</p> <p>morning [12] - 4:3, 4:7, 4:9, 4:14, 4:18, 4:24, 5:1, 8:12, 9:15, 36:2, 39:6, 42:15</p> <p>most [2] - 8:20, 15:14</p> <p>motion [22] - 5:18, 5:20, 6:22, 8:6, 9:17, 11:20, 11:21, 11:23, 17:14, 17:17, 17:23, 18:25, 19:4, 20:4, 20:17, 20:22, 20:23, 20:24, 21:22, 26:8, 36:13, 41:17</p> <p>motions [10] - 17:1, 22:4, 22:20, 28:17, 28:21, 29:5, 35:16, 35:22, 36:9, 41:9</p> <p>mountain [1] - 33:16</p> <p>move [4] - 5:19, 13:20, 15:3, 15:25</p> <p>moved [4] - 5:17, 11:16, 13:12, 17:3</p> <p>moving [2] - 13:15, 29:13</p> <p>MR [61] - 4:7, 4:9, 4:11, 4:12, 4:14, 4:22, 5:1, 5:3, 5:4, 9:15, 11:8, 11:13, 11:15, 11:25, 13:24, 15:6, 15:13, 15:17, 15:19, 16:2, 16:4, 17:6, 17:20, 21:25, 23:22, 25:15, 25:21, 26:5, 31:15, 32:14, 32:16, 32:24, 33:1, 33:4, 33:9, 33:13, 33:16, 33:22, 34:2, 34:6, 34:12, 34:15, 36:18, 38:17, 38:20, 38:25, 39:6, 39:12, 39:15, 39:19, 39:21, 40:9, 40:20, 41:14, 42:3, 42:6, 42:8, 42:9, 42:10, 42:11, 42:13</p> <p>Mr [28] - 1:16, 1:21, 2:1, 2:1, 2:4, 2:8, 2:11, 2:21, 3:1, 9:16, 11:16, 11:17, 11:19, 12:5, 20:23, 21:2, 23:15, 26:3, 33:5, 34:13, 34:17, 35:10, 36:17, 36:19, 37:25, 38:7, 40:19, 40:20</p> <p>mr [1] - 1:21</p> <p>Ms [9] - 2:2, 2:15, 2:18, 3:4, 8:15, 11:19, 13:1, 40:15, 41:1</p> <p>MS [27] - 4:18, 4:20, 4:24, 6:13, 6:18, 7:1, 7:3, 8:5, 8:12, 9:12, 18:13, 18:15,</p>
<p style="text-align: center;">L</p>		
<p>L [1] - 2:15</p> <p>language [1] - 18:9</p> <p>Lanie [3] - 3:8, 42:20, 42:24</p> <p>laptop [1] - 34:1</p> <p>last [3] - 5:10, 36:24, 37:4</p> <p>LAW [3] - 2:5, 2:8, 2:22</p> <p>law [2] - 16:7, 34:25</p> <p>lawyer [1] - 28:2</p> <p>lawyer's [1] - 41:20</p> <p>lawyers [3] - 6:10, 16:10, 16:25</p> <p>laying [1] - 26:8</p> <p>learned [2] - 6:16, 20:21</p> <p>least [4] - 11:3, 30:22, 41:24, 42:1</p> <p>leave [1] - 39:4</p> <p>led [1] - 23:8</p> <p>LEE [1] - 1:17</p> <p>LEGAL [1] - 3:5</p> <p>Lena [1] - 2:2</p> <p>length [5] - 31:1, 33:6, 34:15, 34:20, 41:4</p> <p>lengthy [2] - 25:16, 35:23</p> <p>less [1] - 34:19</p> <p>lesser [1] - 21:19</p> <p>let [6] - 6:10, 19:21, 31:14, 33:18, 37:13, 38:8</p> <p>let's [5] - 5:24, 16:19, 18:11, 19:21, 36:16</p> <p>liability [9] - 12:8, 12:25, 22:11, 23:7, 24:1, 24:6, 24:9, 25:4, 25:11</p> <p>liable [1] - 10:12</p> <p>like [11] - 16:4, 17:25, 29:22, 30:5, 30:21, 32:4, 33:10, 33:14, 34:23, 37:21, 40:25</p> <p>limine [3] - 35:22, 36:9, 36:13</p> <p>limited [1] - 23:6</p> <p>list [2] - 26:14, 28:7</p> <p>listed [1] - 22:8</p> <p>listening [1] - 7:10</p> <p>lists [3] - 35:15, 36:9</p> <p>litigants' [1] - 13:11</p> <p>litigation [3] - 5:12, 5:16, 6:9</p> <p>little [4] - 8:15, 8:17, 32:8, 32:10</p> <p>live [3] - 18:22, 18:23, 31:24</p> <p>lives [2] - 10:13, 10:17</p> <p>LLP [3] - 1:17, 1:22, 2:2</p> <p>long [12] - 7:24, 10:7, 11:3, 14:20, 22:6, 25:23, 26:14, 29:4, 32:8, 37:8, 38:13, 41:19</p> <p>longer [3] - 32:2, 32:11, 36:13</p> <p>look [9] - 8:1, 14:19, 27:20, 30:5, 31:3,</p>	<p style="text-align: center;">M</p>	
	<p>M [3] - 3:8, 42:20, 42:24</p> <p>made [3] - 17:1, 29:18, 29:20</p> <p>make [5] - 4:17, 7:16, 25:9, 28:4, 28:11</p> <p>makes [2] - 24:13, 35:14</p> <p>man [1] - 9:23</p> <p>manner [1] - 28:9</p> <p>MANUEL [1] - 2:19</p> <p>many [2] - 37:16, 37:18</p> <p>March [7] - 29:10, 30:4, 31:6, 32:20, 32:22, 35:5, 39:9</p> <p>Martin [7] - 2:15, 4:18, 6:18, 8:15, 13:1, 40:15, 40:16</p> <p>MARTIN [7] - 4:18, 6:13, 6:18, 7:1, 7:3, 8:5, 40:16</p> <p>matter [7] - 5:12, 6:2, 6:23, 8:2, 26:9, 26:13, 42:22</p> <p>matters [2] - 12:24, 32:20</p> <p>max [1] - 32:10</p> <p>May [4] - 41:5, 41:6, 41:23</p> <p>may [31] - 4:3, 5:18, 10:5, 11:9, 12:8, 12:16, 12:22, 12:24, 13:7, 13:8, 13:20, 13:22, 13:23, 14:13, 14:14, 14:25, 15:2, 16:2, 18:13, 21:18, 24:1, 24:11, 24:24, 24:25, 25:10, 28:7, 32:4, 32:16, 35:17, 37:7, 39:16</p> <p>maybe [2] - 26:17, 32:10</p> <p>Maybe [1] - 39:1</p> <p>McKinney [2] - 2:3, 2:12</p> <p>me [25] - 6:10, 7:17, 8:4, 19:9, 19:21, 25:1, 25:16, 28:10, 28:25, 29:10, 30:9, 30:10, 31:7, 31:14, 31:20, 33:18, 35:2, 35:12, 36:20, 37:13, 38:8, 40:24, 41:19, 42:1</p> <p>mean [3] - 30:24, 31:12, 38:18</p> <p>means [2] - 29:9, 29:15</p> <p>measured [1] - 32:1</p> <p>mechanical [1] - 1:24</p> <p>media [3] - 7:16, 21:3, 23:14</p> <p>Medina [2] - 4:19, 6:18</p> <p>MEDINA [1] - 2:15</p> <p>Melissa [4] - 4:20, 8:12, 18:15, 40:13</p> <p>melissa [1] - 3:4</p> <p>mention [2] - 11:6, 19:13</p> <p>mentioned [3] - 19:3, 19:16, 21:10</p> <p>mic [1] - 6:14</p> <p>Michael [1] - 1:21</p> <p>Michelle [3] - 2:18, 4:24, 40:2</p>	

<p>18:25, 19:7, 19:12, 19:15, 19:20, 19:23, 20:6, 20:10, 20:12, 40:2, 40:6, 40:13, 40:16, 42:12, 42:14</p> <p>much [5] - 15:19, 24:22, 25:6, 27:15, 36:3</p> <p>multi [1] - 37:14</p> <p>multi-defendant [1] - 37:14</p> <p>multiple [2] - 36:21, 38:15</p> <p>multiple-defendant [1] - 38:15</p> <p>murdered [1] - 11:19</p> <p>My [1] - 37:22</p> <p>my [32] - 12:19, 14:11, 14:15, 14:24, 15:21, 18:9, 21:17, 23:13, 25:14, 26:2, 28:15, 28:22, 29:8, 29:17, 29:21, 31:12, 32:5, 32:11, 34:1, 34:5, 34:16, 34:19, 34:20, 34:25, 35:18, 36:20, 36:22, 38:18, 40:4, 40:21, 42:21</p> <p>myself [1] - 17:7</p>	<p>20:8, 20:15, 20:18, 20:19, 20:25, 21:11, 21:22, 22:13, 23:7, 23:21, 24:2, 24:6, 24:21, 25:16, 25:18, 25:22, 26:18, 27:14, 27:15, 27:21, 27:24, 28:4, 28:5, 28:12, 28:24, 29:3, 29:17, 29:20, 30:8, 31:5, 31:24, 32:2, 32:6, 32:19, 33:18, 34:5, 34:10, 36:11, 37:11, 37:15, 38:10, 38:11, 38:12, 39:3</p> <p>notebook [2] - 33:23, 34:8</p> <p>notebooks [2] - 33:10, 33:14</p> <p>nothing [2] - 9:19, 42:4</p> <p>notice [1] - 5:9</p> <p>November [1] - 28:24</p> <p>now [11] - 6:7, 10:8, 17:17, 18:20, 21:6, 22:5, 30:2, 31:24, 32:8, 36:12, 38:14</p> <p>Number [1] - 4:4</p> <p>number [3] - 6:16, 26:11, 28:17</p> <p>numbered [1] - 42:22</p> <p>numerous [2] - 16:24</p>	<p>27:12, 27:19, 27:23, 28:4, 28:9, 28:17, 29:1, 29:3, 29:5, 29:14, 29:17, 29:23, 30:3, 30:4, 30:9, 30:11, 30:12, 30:15, 30:16, 30:17, 30:18, 30:20, 30:22, 30:23, 30:24, 30:25, 31:1, 31:21, 31:25, 32:1, 32:3, 32:4, 32:13, 32:17, 32:18, 33:6, 33:11, 33:14, 33:16, 34:4, 34:8, 34:10, 34:15, 34:20, 34:21, 34:22, 35:1, 35:2, 36:1, 36:3, 36:9, 36:14, 36:17, 36:21, 37:1, 37:17, 37:19, 37:20, 37:21, 38:3, 38:10, 38:11, 38:13, 38:20, 38:21, 39:1, 39:9, 39:21, 40:2, 41:8, 41:9, 42:21, 42:21, 42:22</p> <p>OF [8] - 1:1, 1:7, 1:10, 2:1, 2:15, 2:18, 3:1, 3:5</p> <p>off [3] - 4:17, 18:11, 29:4</p> <p>Off [1] - 40:23</p> <p>Off-the-record [1] - 40:23</p> <p>office [3] - 6:21, 7:7, 36:20</p> <p>officer [2] - 23:20, 24:5</p> <p>Officer [2] - 23:25, 24:19</p> <p>officers [5] - 16:13, 21:6, 24:12, 37:10, 38:6</p>
<p style="text-align: center;">N</p>	<p style="text-align: center;">O</p>	
<p>N [1] - 4:1</p> <p>Nachtigall [3] - 2:8, 5:3, 39:7</p> <p>NACHTIGALL [6] - 5:3, 39:6, 39:12, 39:15, 39:19, 42:10</p> <p>NADEEM [1] - 2:18</p> <p>name [1] - 11:14</p> <p>narrow [2] - 22:25</p> <p>nature [2] - 21:7, 36:9</p> <p>necessary [4] - 12:20, 13:8, 21:4, 26:18</p> <p>need [17] - 9:13, 13:19, 20:13, 21:19, 22:18, 28:15, 29:3, 29:11, 29:12, 29:25, 30:6, 32:25, 33:21, 35:2, 36:12, 41:12, 41:13</p> <p>needed [5] - 13:25, 25:25, 27:10, 34:1, 36:13</p> <p>needs [1] - 9:2</p> <p>never [3] - 14:22, 19:3, 37:14</p> <p>new [1] - 10:19</p> <p>newly [1] - 11:24</p> <p>news [2] - 6:2, 7:16</p> <p>next [4] - 18:6, 21:24, 22:2, 28:19</p> <p>NICHOLAS [2] - 1:21, 1:21</p> <p>Nicholas [6] - 4:10, 4:11, 11:15, 11:19, 17:20, 26:5</p> <p>night [1] - 22:22</p> <p>no [27] - 8:6, 11:23, 18:22, 18:23, 19:10, 19:19, 20:1, 25:1, 26:9, 27:5, 27:7, 36:13, 39:23, 40:10, 40:14, 40:21, 41:10, 41:14, 41:15, 42:6, 42:8, 42:9, 42:10, 42:11, 42:12, 42:13, 42:14</p> <p>No [2] - 5:6, 20:14</p> <p>Nodding [1] - 17:6</p> <p>nonsuit [1] - 9:21</p> <p>not [77] - 5:11, 5:18, 6:1, 6:24, 7:13, 7:18, 7:23, 8:6, 8:7, 9:17, 10:4, 10:5, 10:7, 10:12, 12:10, 13:7, 14:14, 14:21, 15:3, 15:8, 15:11, 15:19, 16:6, 16:15, 16:20, 17:2, 17:4, 17:13, 18:4, 19:25,</p>	<p>O [1] - 4:1</p> <p>O'NEILL [1] - 1:17</p> <p>objection [1] - 33:21</p> <p>objections [3] - 41:13, 41:14, 41:15</p> <p>observed [1] - 17:3</p> <p>observer [1] - 6:2</p> <p>obtain [1] - 23:16</p> <p>obtaining [1] - 25:19</p> <p>obviously [18] - 5:10, 5:13, 6:2, 6:23, 7:8, 8:1, 11:4, 13:19, 15:11, 16:24, 17:9, 21:15, 25:8, 26:7, 32:7, 32:16, 32:21, 41:7</p> <p>occurred [1] - 21:6</p> <p>occurring [1] - 27:18</p> <p>occurs [1] - 28:6</p> <p>OCTOBER [1] - 1:7</p> <p>odd [1] - 17:7</p> <p>Odom [4] - 2:4, 4:14, 35:10, 40:19</p> <p>ODOM [3] - 2:5, 4:14, 40:20</p> <p>of [202] - 3:10, 4:2, 4:5, 4:12, 4:15, 5:12, 5:25, 6:2, 6:3, 6:5, 6:6, 6:16, 7:3, 7:13, 7:15, 7:19, 7:24, 8:2, 8:17, 8:18, 8:20, 9:1, 9:7, 9:13, 9:16, 9:20, 10:1, 10:7, 10:15, 11:17, 12:3, 12:4, 12:9, 12:10, 12:16, 12:20, 12:22, 13:2, 13:7, 13:10, 13:19, 13:23, 13:25, 14:1, 14:3, 14:10, 14:25, 15:4, 15:9, 15:14, 15:22, 15:23, 16:6, 16:8, 16:9, 16:11, 16:17, 16:21, 16:22, 17:7, 17:11, 17:13, 17:15, 17:16, 18:9, 18:10, 19:5, 19:17, 19:24, 20:8, 20:25, 21:1, 21:3, 21:5, 21:7, 21:11, 21:14, 21:21, 22:2, 22:9, 22:17, 22:20, 22:23, 22:24, 22:25, 23:5, 23:12, 23:15, 23:17, 23:20, 23:22, 23:23, 24:2, 24:5, 24:7, 24:14, 24:16, 24:23, 24:24, 24:25, 25:4, 25:11, 25:17, 25:21, 26:11, 26:15, 26:17, 26:19, 26:23, 26:25, 27:5,</p>	<p>Official [4] - 3:8, 3:9, 42:20, 42:24</p> <p>oh [1] - 31:9</p> <p>okay [7] - 19:21, 20:11, 32:15, 36:11, 37:23, 41:15, 41:17</p> <p>old [1] - 13:20</p> <p>on [74] - 4:17, 5:8, 5:14, 5:18, 6:1, 6:4, 6:20, 8:7, 8:8, 8:15, 8:21, 9:15, 10:25, 11:12, 11:13, 11:17, 12:8, 12:24, 13:25, 14:11, 14:19, 16:6, 16:11, 16:16, 17:2, 17:4, 17:11, 17:23, 18:2, 18:25, 19:4, 20:13, 20:24, 21:1, 21:19, 22:3, 22:20, 22:22, 23:4, 23:5, 23:12, 24:25, 25:3, 25:5, 25:9, 25:10, 25:11, 26:10, 27:12, 27:13, 28:20, 28:22, 29:5, 29:16, 30:3, 31:3, 31:6, 32:5, 32:17, 33:1, 34:1, 34:5, 34:19, 35:3, 35:7, 35:16, 35:17, 35:19, 35:21, 37:20, 38:8, 39:21, 40:2</p> <p>one [27] - 10:6, 10:14, 10:16, 11:2, 12:13, 13:9, 17:10, 21:13, 21:17, 24:5, 25:13, 25:20, 26:13, 26:17, 27:1, 27:2, 27:13, 27:19, 29:21, 29:24, 32:10, 33:7, 35:14, 37:1, 37:15, 38:21</p> <p>ones [2] - 34:9, 34:10</p> <p>only [16] - 5:11, 9:7, 10:6, 10:12, 10:18, 11:6, 15:13, 18:17, 18:20, 24:24, 24:25, 25:2, 35:10, 37:13, 38:18, 39:15</p> <p>opening [1] - 36:11</p> <p>openings [1] - 31:22</p> <p>opinion [1] - 26:2</p> <p>opportunities [1] - 31:3</p> <p>opportunity [5] - 17:13, 19:8, 20:20, 20:24, 31:13</p> <p>opposed [1] - 26:1</p> <p>optimistic [1] - 37:8</p> <p>or [38] - 6:7, 6:14, 7:12, 7:20, 8:21, 9:9, 9:21, 11:2, 11:24, 13:4, 13:21, 13:22, 14:13, 14:21, 20:8, 22:2, 22:13, 22:22,</p>

23:7, 23:8, 23:11, 24:10, 24:19, 24:25, 26:17, 27:13, 29:1, 30:7, 31:6, 31:12, 32:10, 32:20, 32:22, 36:12, 37:13, 38:6
order [13] - 4:2, 16:22, 17:12, 17:13, 17:16, 17:22, 18:9, 18:10, 18:21, 22:11, 23:16
ordered [1] - 18:5
orders [2] - 28:20, 35:15
OSCAR [1] - 3:5
other [16] - 5:5, 5:11, 11:2, 20:15, 24:7, 24:9, 24:10, 24:15, 24:18, 27:13, 28:15, 32:20, 35:13, 35:18, 38:6, 41:10
otherwise [2] - 10:23, 35:11
Otway [1] - 41:19
our [12] - 9:23, 10:6, 10:8, 10:12, 12:10, 18:18, 19:12, 24:5, 27:5, 32:1, 32:4, 37:21
ourselves [1] - 28:13
out [19] - 9:21, 10:5, 12:13, 13:1, 14:10, 15:14, 16:4, 24:4, 25:13, 26:8, 26:22, 27:8, 28:20, 29:22, 30:6, 31:17, 34:3, 36:4, 40:24
outside [1] - 14:1
over [4] - 5:10, 13:14, 28:19, 38:15
overlap [2] - 13:21, 21:12
overlook [1] - 38:16
overly [1] - 28:12

P

P [2] - 1:21, 4:1
P.O [1] - 3:5
panel [1] - 24:17
paper [1] - 33:11
papers [1] - 24:5
PARDO [1] - 3:5
Pardo [2] - 4:20, 8:13
parent [1] - 39:9
Parkway [3] - 1:18, 1:22, 2:22
part [6] - 6:6, 15:15, 17:11, 24:7, 27:13, 36:21
partial [4] - 5:21, 17:4, 17:18, 20:5
participated [1] - 17:9
particular [4] - 18:11, 18:24, 23:20, 27:6
parties [2] - 16:25, 22:15
partner [1] - 34:25
past [1] - 23:24
path [1] - 26:12
pattern [1] - 27:23
pending [13] - 6:7, 11:23, 16:5, 19:10, 19:19, 20:1, 20:4, 20:8, 22:4, 28:18, 29:14, 35:16, 41:10
people [4] - 6:20, 14:20, 37:8, 37:24
per [2] - 30:12, 30:15
perhaps [10] - 5:22, 5:23, 13:18, 21:8, 28:24, 30:19, 35:14, 36:7, 36:8, 36:13
person [2] - 10:14, 16:7
personal [2] - 34:22, 39:8
perspective [3] - 12:11, 14:15, 15:21

Phase [3] - 22:20, 25:3, 25:4
phase [2] - 23:23, 24:24
phone [2] - 4:17, 30:6
physical [1] - 34:9
pick [1] - 30:22
picking [1] - 31:2
place [1] - 31:1
placed [1] - 31:4
plaintiff [1] - 42:2
plaintiffs [18] - 4:8, 4:10, 5:20, 8:22, 11:12, 13:14, 15:20, 17:3, 17:21, 18:17, 19:1, 19:14, 20:3, 20:18, 22:7, 26:6, 37:20, 38:12
PLAINTIFFS [2] - 1:16, 1:21
plaintiffs' [3] - 15:12, 21:8, 31:14
plate [1] - 28:22
pleading [1] - 36:11
pleadings [2] - 19:1, 19:4
please [1] - 6:17
pled [1] - 17:25
point [12] - 10:5, 11:25, 12:13, 14:5, 14:9, 15:11, 16:4, 17:19, 24:4, 24:23, 26:24, 27:5
pointed [2] - 13:1, 25:13
points [2] - 12:12, 21:25
police [1] - 21:6
Police [2] - 24:10, 27:23
policymaker [1] - 23:9
portion [1] - 15:8
portions [1] - 9:1
position [11] - 10:9, 17:7, 19:12, 19:18, 19:24, 20:2, 20:3, 20:22, 35:1, 37:21, 40:21
possibilities [2] - 14:21, 14:22
possibility [1] - 14:25
possible [7] - 9:3, 27:24, 28:19, 29:22, 29:23, 29:25, 30:1
potential [4] - 12:8, 19:13, 33:6, 35:9
potentially [2] - 20:16, 37:15
practical [3] - 26:13, 26:24, 27:24
practically [1] - 27:11
practice [8] - 22:14, 23:8, 23:11, 23:15, 23:19, 27:23, 36:11, 41:22
practices [1] - 24:10
preclude [1] - 15:1
prejudice [3] - 7:12, 7:19, 20:18
preparation [1] - 20:25
prepared [4] - 15:24, 17:15, 39:2, 39:3
present [2] - 16:12, 35:17
presentation [3] - 28:6, 29:14, 31:19
presented [3] - 21:14, 29:2, 41:9
presenting [1] - 13:21
presided [1] - 38:14
president [2] - 34:25, 35:3
press [1] - 30:22
pretrial [6] - 35:15, 35:19, 35:20, 35:22, 35:25, 36:8
prevent [1] - 13:21
previously [2] - 5:20, 6:5

prior [2] - 7:6, 7:21
privilege [7] - 6:6, 13:5, 13:6, 15:1, 15:3, 15:5, 15:11
probably [4] - 5:9, 13:15, 22:6, 34:8
problem [2] - 8:17, 41:19
problematic [1] - 8:3
procedure [1] - 7:11
procedures [3] - 33:9, 33:10, 33:13
proceed [1] - 7:6
proceeding [2] - 9:5, 25:20
Proceedings [1] - 1:24
proceedings [11] - 6:22, 6:25, 7:5, 9:9, 16:25, 17:9, 19:2, 21:20, 28:10, 42:17, 42:22
PROCEEDINGS [1] - 1:10
process [2] - 14:6, 14:15
produced [1] - 1:25
proffers [1] - 32:8
promise [1] - 35:2
promised [1] - 35:4
properly [1] - 16:13
prosecution [2] - 12:17, 12:23
protect [3] - 9:9, 11:22, 12:2
protected [2] - 8:22, 10:12
protective [3] - 12:4, 12:14, 13:10
proves [1] - 27:5
provide [1] - 41:25
public [9] - 7:5, 9:6, 9:21, 11:10, 11:18, 21:2, 21:5, 24:15, 38:23
pull [3] - 30:6, 33:25, 40:24
punishment [1] - 23:23
purposes [1] - 20:25
push [2] - 13:12, 29:4
pushing [1] - 28:20
put [6] - 14:11, 24:17, 27:12, 32:17, 34:4, 37:13
putting [2] - 15:2, 37:20

Q

qualified [3] - 9:23, 10:16, 10:25
question [7] - 6:3, 6:19, 10:21, 14:24, 15:10, 23:20, 33:7
questioning [1] - 8:21
questions [5] - 13:23, 16:8, 16:14, 21:16, 22:13
quick [1] - 38:12

R

R [2] - 2:21, 4:1
raised [2] - 18:1, 22:1
raises [1] - 24:15
rather [1] - 36:22
reach [1] - 20:7
read [2] - 33:9, 34:9
realistically [2] - 26:14, 28:22
really [11] - 11:18, 14:22, 21:18, 27:4, 27:5, 27:23, 29:12, 29:15, 29:21, 31:6, 37:25

reason [3] - 11:6, 29:7, 33:19
reasonable [2] - 22:22, 32:6
reasonably [1] - 31:25
reasoning [1] - 31:16
reasons [2] - 26:11, 26:24
recall [1] - 7:25
receive [1] - 9:4
received [2] - 6:1, 8:23
recent [1] - 27:20
recently [4] - 8:10, 8:14, 11:24, 26:21
recognize [1] - 9:23
recognized [1] - 27:11
recommending [1] - 39:24
record [5] - 4:6, 6:17, 21:5, 40:23, 42:22
recorded [1] - 1:24
REDDEN [1] - 2:2
refile [1] - 35:14
refine [1] - 38:8
regard [1] - 17:15
regarding [1] - 21:3
regards [2] - 5:25, 7:23
reindict [1] - 7:17
reindicted [6] - 6:8, 6:11, 7:20, 8:14, 11:24, 15:23
reindictment [3] - 5:25, 15:22, 29:2
reindictments [3] - 5:15, 6:23, 7:4
relate [1] - 16:9
relating [1] - 16:14
released [1] - 9:5
relevance [1] - 37:17
relevant [2] - 24:2, 24:3
remainder [1] - 30:10
remains [1] - 18:18
remember [2] - 37:21, 37:24
rendered [1] - 9:24
repeat [1] - 33:12
repeating [1] - 28:12
Reporter [4] - 3:8, 3:9, 42:20, 42:24
REPORTER'S [1] - 42:19
reports [1] - 23:14
represent [5] - 6:11, 6:21, 8:14, 19:18
representing [1] - 8:10
request [2] - 29:3, 39:15
required [1] - 19:25
requires [1] - 31:11
requiring [1] - 21:12
research [1] - 20:20
resolved [1] - 7:22
resources [2] - 26:19, 29:23
respect [6] - 11:21, 12:1, 16:6, 24:11, 27:18, 28:8
respected [1] - 14:7
respond [1] - 41:1
response [7] - 5:6, 8:7, 20:14, 20:19, 20:21, 21:9, 30:3
responsibility [3] - 11:22, 12:2, 29:17
restriction [1] - 10:7
result [2] - 16:21, 29:18

resulted [1] - 10:15
retiring [1] - 36:23
review [2] - 20:24, 34:1
REYNA [1] - 3:2
Reyna [1] - 4:23
right [12] - 10:6, 14:3, 15:6, 15:8, 15:13, 18:4, 27:1, 32:8, 32:14, 32:17, 33:22, 34:13
rights [4] - 12:3, 12:16, 13:11, 16:11
ripe [6] - 5:18, 5:22, 8:6, 17:18, 20:15, 21:23
RMR [2] - 3:8, 42:20
Robert [1] - 18:19
ROBERT [1] - 2:16
Room [1] - 3:11
rule [6] - 10:1, 10:24, 10:25, 25:10, 33:19, 37:11
ruled [3] - 10:3, 36:12, 36:13
rules [3] - 21:19, 25:5, 35:16
ruling [6] - 21:1, 22:5, 29:5, 36:7, 36:11, 38:8
rulings [2] - 22:3, 41:25
Rusk [1] - 3:10
Russell [1] - 2:11
Rusty [2] - 9:15, 36:18
rusty [1] - 5:4
RUSTY [1] - 2:12

S

S [2] - 2:1, 4:1
said [10] - 8:16, 10:18, 16:21, 21:18, 25:22, 31:9, 31:10, 35:2, 35:6
SALAZAR [1] - 2:19
Salazar [2] - 4:25, 40:3
same [3] - 10:8, 25:8, 40:4
saved [1] - 10:13
saving [1] - 10:17
Sawyer [1] - 2:5
say [7] - 11:9, 13:11, 19:10, 20:20, 33:10, 33:13, 39:2
saying [8] - 14:20, 14:21, 18:2, 26:22, 27:16, 32:23, 37:22, 38:19
says [1] - 26:9
scare [2] - 25:16, 30:8
schedule [1] - 35:7
scheduled [3] - 12:19, 36:24, 37:6
schedules [1] - 35:11
scheduling [4] - 14:2, 20:16, 34:22, 39:23
school [5] - 29:8, 34:25, 39:10, 40:6, 40:18
school-aged [3] - 39:10, 40:6, 40:18
seal [4] - 6:22, 6:25, 9:17, 11:17
sealed [5] - 7:2, 7:25, 9:2, 9:9, 9:10
sealing [2] - 7:23, 8:3
seated [1] - 4:3
secrets [1] - 9:9
see [7] - 11:18, 26:17, 29:3, 29:7, 33:9,

41:16
seems [1] - 8:3
seen [1] - 6:24
selection [1] - 30:24
selectively [1] - 14:12
send [1] - 36:20
sense [2] - 24:13, 35:14
SEPOLIO [1] - 3:5
Sepolio [2] - 4:21, 8:13
seriously [1] - 7:11
service [6] - 22:17, 23:5, 24:2, 24:25, 25:4, 27:18
set [2] - 22:25, 36:2
setting [5] - 13:16, 28:24, 35:20, 35:21, 41:21
seven [2] - 18:6, 31:21
Seventh [2] - 14:3, 27:1
several [3] - 5:10, 26:16, 31:17
share [1] - 31:18
shattering [1] - 41:11
she [6] - 7:15, 27:10, 35:1, 35:2, 41:1
shooting [1] - 10:14
short [3] - 5:8, 15:21, 26:10
shortcut [1] - 26:10
shorten [1] - 21:20
shortening [1] - 32:9
shorter [1] - 37:5
shots [1] - 10:15
should [3] - 27:16, 31:21
shouldn't [1] - 24:20
showing [1] - 27:22
shows [1] - 27:24
side [2] - 25:11, 29:16
Silva [1] - 2:2
simply [2] - 15:9, 36:9
Sims [1] - 26:23
single [2] - 27:1, 39:9
Sir [1] - 6:13
sir [10] - 11:7, 15:16, 16:1, 18:3, 33:8, 34:2, 34:6, 36:15, 38:25, 42:2
sitting [2] - 7:10, 13:2
six [5] - 12:9, 30:12, 30:14, 38:22
six-year [1] - 12:9
size [1] - 22:9
sketched [1] - 31:17
Smith [7] - 1:16, 3:8, 4:7, 15:20, 33:4, 42:20, 42:24
SMITH [13] - 1:17, 4:7, 15:19, 33:4, 33:9, 33:13, 33:16, 33:22, 34:2, 34:6, 34:12, 41:14, 42:6
so [62] - 5:24, 6:7, 6:10, 6:20, 7:5, 7:9, 7:18, 7:19, 8:7, 10:14, 11:5, 11:13, 11:18, 11:19, 13:17, 14:11, 14:15, 16:8, 16:16, 17:7, 17:14, 18:11, 18:21, 19:3, 19:8, 19:17, 19:18, 20:23, 21:11, 21:21, 21:25, 22:7, 23:19, 24:14, 24:23, 25:18, 28:7, 28:19, 29:25, 30:2, 30:16, 30:18, 30:25, 31:6, 31:9, 31:14, 31:16, 31:22, 31:24, 32:9, 32:12, 33:23, 34:3, 35:23,

36:5, 36:15, 37:15, 39:3, 41:12, 41:17, 41:21, 41:23
some [28] - 5:11, 5:14, 5:15, 7:24, 12:22, 13:19, 13:22, 14:13, 14:25, 15:23, 16:8, 16:9, 21:23, 22:8, 24:14, 28:20, 29:1, 29:5, 29:10, 29:12, 36:3, 36:8, 36:10, 37:7, 38:16, 41:8, 41:9, 42:1
somebody [2] - 14:21, 26:9
somehow [2] - 10:24, 25:19
someone [1] - 29:18
something [5] - 28:25, 30:7, 31:10, 31:11, 31:12
sometime [2] - 29:10, 30:4
sort [2] - 8:18, 37:21
source [1] - 23:17
southern [1] - 3:10
Southern [1] - 42:20
SOUTHERN [1] - 1:1
speak [6] - 6:14, 21:8, 21:11, 21:14, 21:18, 38:18
split [1] - 8:25
spoken [1] - 26:21
spring [6] - 28:25, 29:9, 39:8, 40:5, 40:17, 41:7
Squad [1] - 27:6
squad [2] - 27:12, 27:18
St [4] - 2:3, 2:16, 2:19, 3:2
stand [2] - 10:21, 15:10
stands [1] - 22:5
start [9] - 5:24, 27:14, 28:20, 31:14, 32:19, 32:20, 34:13, 34:20, 36:2
starting [3] - 37:2, 37:3, 41:6
starts [1] - 36:24
stated [1] - 40:20
statement [1] - 7:16
statements [1] - 8:20
States [2] - 3:9, 42:20
STATES [2] - 1:1, 1:11
status [2] - 5:8, 20:7
STATUS [1] - 1:10
stay [6] - 10:2, 11:1, 11:3, 37:10, 37:11, 37:12
stenography [1] - 1:24
steps [1] - 21:4
Steven [2] - 5:3, 39:7
STEVEN [1] - 2:8
stick [1] - 33:25
still [4] - 17:18, 18:24, 26:16, 29:8
stipulated [1] - 22:15
story [3] - 9:19, 9:21, 27:7
streamlined [1] - 25:7
Street [2] - 10:11, 22:22
strongly [1] - 10:11
structuring [1] - 29:14
stuff [1] - 7:10
subject [3] - 5:12, 7:20, 28:11
submit [1] - 24:19
submitted [2] - 23:7, 23:25

submitting [1] - 23:16
successful [1] - 37:11
such [2] - 19:3, 31:2
sufficient [1] - 24:6
suggest [2] - 24:20, 35:12
suggesting [1] - 38:13
suggestion [2] - 35:18, 36:15
suggestions [1] - 36:6
Suite [7] - 1:18, 1:22, 2:3, 2:6, 2:9, 2:13, 2:22
summary [10] - 5:21, 11:17, 17:4, 17:8, 17:18, 20:5, 23:1, 23:3, 28:18, 35:16
summer [1] - 41:24
supervise [1] - 16:15
supervised [1] - 16:13
supervision [2] - 16:9, 16:14
supervisors [1] - 16:11
sure [5] - 4:17, 18:14, 21:11, 28:5, 28:11
suspect [3] - 30:21, 36:1, 38:10
sympathetic [2] - 12:14, 13:10

T

table [2] - 18:12, 36:16
tainted [1] - 8:20
take [10] - 8:1, 15:9, 18:11, 20:2, 26:10, 28:3, 30:21, 37:9, 38:14, 41:12
taken [4] - 15:24, 20:3, 20:24, 41:2
takes [2] - 10:21, 35:1
talk [3] - 14:13, 23:19, 31:7
talked [1] - 33:5
talking [10] - 10:8, 15:8, 15:9, 28:2, 30:23, 32:13, 32:19, 34:3, 41:3, 41:5
TAYLOR [4] - 4:24, 40:2, 40:6, 42:12
Taylor [3] - 2:18, 4:24, 40:2
tell [4] - 29:20, 31:7, 35:9, 40:24
telling [1] - 24:21
tells [1] - 10:24
tension [3] - 12:18, 13:3, 13:18
terms [5] - 24:16, 29:8, 32:18, 34:15, 34:22
testify [1] - 13:4
testifying [1] - 12:24
testimony [7] - 7:8, 8:20, 9:2, 12:6, 13:3, 15:4, 21:20
TEXAS [2] - 1:1, 1:5
Texas [14] - 1:18, 1:23, 2:3, 2:6, 2:13, 2:16, 2:19, 2:23, 3:2, 3:6, 3:10, 3:11, 34:4, 42:21
than [5] - 13:15, 22:7, 36:22, 37:14, 41:8
thank [22] - 5:7, 8:9, 9:11, 9:12, 11:7, 11:8, 15:16, 15:17, 16:1, 16:18, 18:3, 20:12, 26:3, 33:2, 34:12, 36:5, 36:15, 36:18, 38:25, 39:18, 39:19, 42:15
that [230] - 5:15, 5:16, 5:17, 5:18, 5:22, 5:23, 6:3, 6:5, 6:6, 6:8, 6:14, 7:4, 7:14, 7:16, 8:8, 8:18, 8:22, 8:24, 9:3, 9:4, 9:8, 9:9, 9:19, 9:24, 10:6, 10:8, 10:10,

10:12, 10:13, 10:14, 10:16, 10:18, 10:20, 10:21, 11:5, 11:18, 12:4, 12:6, 12:7, 12:18, 13:3, 13:8, 13:20, 13:22, 14:1, 14:5, 14:6, 14:14, 14:24, 14:25, 15:2, 15:4, 15:8, 15:11, 15:12, 15:21, 16:5, 16:7, 16:8, 16:9, 16:17, 16:21, 16:22, 17:2, 17:11, 17:12, 17:14, 17:24, 17:25, 18:1, 18:2, 18:8, 18:17, 18:23, 18:24, 19:1, 19:10, 19:11, 19:12, 19:14, 19:18, 19:19, 19:24, 19:25, 20:2, 20:3, 20:13, 20:21, 21:4, 21:5, 21:7, 21:8, 21:15, 21:17, 21:18, 21:21, 21:25, 22:15, 22:17, 22:21, 22:22, 23:5, 23:8, 23:10, 23:12, 23:14, 23:15, 23:20, 23:22, 23:24, 24:1, 24:2, 24:5, 24:11, 24:12, 24:14, 24:15, 24:17, 24:18, 24:19, 24:20, 24:23, 25:8, 25:18, 25:22, 26:12, 26:17, 26:19, 26:22, 26:24, 27:4, 27:5, 27:12, 27:14, 27:21, 28:1, 28:5, 28:9, 28:10, 28:11, 28:12, 28:17, 29:2, 29:6, 29:15, 29:16, 29:17, 29:22, 30:7, 30:11, 30:14, 31:2, 31:9, 31:11, 31:13, 31:19, 32:1, 32:5, 32:9, 33:5, 33:10, 33:12, 33:13, 33:18, 34:3, 34:5, 34:8, 34:9, 34:10, 34:18, 34:23, 35:1, 35:3, 35:6, 35:7, 35:9, 35:10, 35:12, 35:17, 35:18, 35:22, 35:23, 36:2, 36:3, 36:9, 36:14, 36:21, 36:23, 37:1, 37:17, 38:3, 38:7, 38:8, 38:16, 38:17, 38:18, 39:2, 39:4, 39:15, 39:16, 40:25, 41:4, 41:7, 41:9, 41:10, 41:17, 41:19, 41:22, 41:25, 42:1, 42:21
that's [37] - 7:3, 7:9, 7:10, 7:11, 8:19, 9:23, 10:8, 10:21, 11:1, 11:2, 11:6, 11:19, 13:8, 14:8, 14:16, 14:17, 14:18, 15:13, 19:3, 19:20, 26:1, 29:23, 29:25, 31:7, 32:14, 32:17, 33:19, 33:24, 34:16, 34:19, 35:9, 36:1, 36:15, 37:18, 38:4, 38:22, 41:5
THE [87] - 1:10, 1:16, 1:21, 2:1, 2:8, 2:11, 2:15, 2:18, 2:21, 3:1, 3:4, 4:3, 4:16, 5:5, 5:7, 6:14, 6:24, 7:2, 7:23, 8:9, 9:11, 9:13, 11:7, 11:11, 11:14, 11:23, 12:12, 14:24, 15:8, 15:16, 15:18, 16:1, 16:3, 16:18, 17:7, 18:3, 18:14, 18:23, 19:6, 19:8, 19:13, 19:18, 19:21, 19:24, 20:7, 20:11, 20:13, 20:15, 23:12, 25:12, 25:16, 26:3, 27:25, 32:12, 32:15, 32:22, 32:25, 33:2, 33:8, 33:12, 33:15, 33:18, 33:23, 34:3, 34:7, 34:13, 35:25, 38:7, 38:19, 38:24, 39:2, 39:11, 39:14, 39:18, 39:20, 39:25, 40:5, 40:7, 40:11, 40:15, 40:19, 40:22, 40:24, 41:15, 42:5, 42:7, 42:15
The [1] - 42:17
the [451] - 4:2, 4:6, 4:8, 4:10, 4:11, 4:12, 4:14, 5:10, 5:12, 5:17, 5:20, 5:25, 6:1, 6:2, 6:3, 6:6, 6:11, 6:16, 6:17, 6:20, 6:21, 6:22, 6:23, 7:1, 7:2, 7:3, 7:4, 7:5, 7:6, 7:7, 7:10, 7:11, 7:12, 7:14, 7:15, 7:16, 7:18, 7:21, 7:24, 8:2, 8:7, 8:18,

8:19, 8:20, 8:22, 9:2, 9:4, 9:6, 9:7, 9:13, 9:17, 9:18, 9:19, 9:22, 9:24, 10:2, 10:5, 10:6, 10:7, 10:8, 10:9, 10:10, 10:11, 10:13, 10:14, 10:15, 10:16, 10:18, 10:19, 10:21, 10:23, 10:25, 11:2, 11:3, 11:4, 11:6, 11:12, 11:15, 11:17, 11:18, 11:20, 11:21, 11:22, 11:23, 12:1, 12:2, 12:3, 12:7, 12:9, 12:10, 12:15, 12:16, 12:19, 12:20, 12:21, 12:22, 13:1, 13:2, 13:4, 13:7, 13:8, 13:13, 13:15, 13:17, 13:18, 13:19, 13:22, 13:23, 13:24, 14:1, 14:2, 14:3, 14:5, 14:7, 14:10, 14:12, 14:14, 14:15, 14:16, 14:17, 14:18, 14:25, 15:1, 15:4, 15:6, 15:9, 15:11, 15:12, 15:13, 15:14, 15:20, 15:21, 15:24, 16:5, 16:6, 16:8, 16:9, 16:10, 16:12, 16:16, 16:17, 16:20, 16:21, 17:1, 17:2, 17:3, 17:11, 17:12, 17:13, 17:16, 17:20, 17:22, 17:23, 18:2, 18:5, 18:9, 18:10, 18:11, 18:17, 18:19, 18:21, 18:22, 18:25, 19:1, 19:2, 19:4, 19:5, 19:8, 19:14, 19:16, 19:17, 20:3, 20:7, 20:8, 20:15, 20:16, 20:18, 20:20, 20:22, 20:24, 21:1, 21:3, 21:6, 21:7, 21:11, 21:13, 21:15, 21:17, 21:19, 21:20, 21:25, 22:3, 22:5, 22:7, 22:8, 22:9, 22:10, 22:11, 22:13, 22:15, 22:16, 22:17, 22:20, 22:21, 22:24, 23:1, 23:3, 23:5, 23:6, 23:8, 23:9, 23:10, 23:13, 23:17, 23:20, 23:21, 23:23, 23:24, 24:1, 24:2, 24:3, 24:5, 24:7, 24:8, 24:10, 24:11, 24:12, 24:15, 24:17, 24:18, 24:24, 24:25, 25:2, 25:3, 25:4, 25:5, 25:7, 25:8, 25:9, 25:10, 25:11, 25:18, 25:21, 25:22, 25:24, 26:1, 26:5, 26:9, 26:12, 26:13, 26:20, 26:24, 26:25, 27:2, 27:4, 27:7, 27:9, 27:11, 27:12, 27:13, 27:14, 27:15, 27:20, 27:21, 27:22, 27:23, 28:7, 28:8, 28:11, 28:19, 29:1, 29:2, 29:5, 29:8, 29:13, 29:14, 29:16, 29:20, 29:23, 30:3, 30:4, 30:8, 30:11, 30:13, 30:22, 30:23, 31:1, 31:2, 31:3, 31:16, 31:19, 32:7, 32:8, 32:9, 32:18, 32:20, 33:4, 33:6, 33:10, 33:13, 33:19, 33:24, 33:25, 34:4, 34:7, 34:9, 34:10, 34:15, 34:18, 34:20, 34:21, 34:24, 34:25, 35:3, 35:9, 35:11, 35:13, 35:15, 35:16, 35:17, 35:19, 35:20, 35:21, 36:2, 36:6, 36:10, 36:11, 36:12, 36:16, 36:21, 37:4, 37:6, 37:7, 37:10, 37:12, 37:17, 37:19, 37:20, 37:23, 37:24, 38:4, 38:6, 38:8, 38:11, 38:12, 38:13, 38:15, 38:21, 39:1, 39:12, 39:13, 39:15, 39:23, 40:4, 40:23, 41:2, 41:4, 41:7, 41:8, 41:9, 41:18, 41:24, 41:25, 42:2, 42:7, 42:21, 42:21, 42:22

their [9] - 12:6, 12:25, 13:6, 15:10, 15:24, 16:14, 18:19, 19:16, 21:9

them [11] - 11:6, 13:14, 13:23, 15:23, 16:15, 17:12, 17:16, 17:22, 19:19, 32:9, 34:10

then [22] - 10:1, 10:2, 10:4, 11:3, 17:17, 19:13, 19:22, 20:21, 21:15, 22:12, 23:4, 24:8, 25:3, 25:10, 28:14, 32:19, 33:21, 35:18, 37:12, 38:8

there [29] - 5:10, 5:13, 5:15, 6:5, 8:6, 8:17, 11:23, 12:18, 13:7, 14:20, 18:22, 19:10, 20:1, 21:18, 22:11, 22:13, 22:15, 22:23, 23:13, 24:18, 25:3, 28:17, 33:20, 35:9, 36:10, 37:15, 38:1, 38:20, 41:10

there's [9] - 14:1, 14:7, 18:9, 23:7, 26:22, 27:5, 27:7, 33:21, 33:23

therefore [1] - 16:11

therefrom [1] - 14:17

these [20] - 6:8, 9:19, 10:19, 12:9, 13:13, 13:19, 13:20, 14:10, 15:14, 15:22, 16:7, 16:13, 16:25, 17:9, 19:2, 24:18, 29:5, 29:13, 38:21, 38:22

they [38] - 10:18, 10:19, 11:3, 11:20, 12:8, 13:4, 13:6, 14:11, 14:12, 14:13, 15:22, 16:14, 16:22, 17:2, 17:10, 18:20, 19:1, 19:15, 19:17, 20:3, 21:14, 21:15, 23:15, 24:17, 25:8, 25:10, 25:24, 27:17, 27:21, 32:2, 32:16, 32:17, 37:22, 37:23

they're [7] - 7:8, 10:20, 11:5, 12:6, 16:15, 32:6, 32:8

they've [4] - 12:5, 15:23, 19:2, 27:17

thing [6] - 15:14, 21:17, 28:1, 31:9, 33:24, 36:14

things [8] - 14:1, 14:13, 17:25, 21:7, 25:12, 30:14, 36:9, 38:21

think [47] - 8:25, 9:3, 11:16, 14:5, 14:13, 14:17, 14:18, 14:24, 15:13, 16:5, 17:22, 18:1, 22:15, 24:14, 24:17, 25:6, 25:7, 26:11, 26:14, 26:21, 27:4, 27:16, 27:19, 27:20, 28:1, 28:3, 29:23, 31:18, 31:19, 31:21, 31:23, 31:24, 32:14, 33:1, 35:10, 35:18, 35:21, 36:5, 36:24, 37:7, 37:19, 37:20, 38:11, 38:12, 39:16, 40:20

thinking [1] - 25:21

this [90] - 5:8, 5:9, 5:11, 5:12, 5:15, 5:16, 6:1, 6:4, 6:8, 6:15, 6:19, 6:23, 7:18, 7:19, 7:24, 8:5, 8:11, 8:19, 9:5, 9:21, 11:9, 11:12, 11:13, 11:20, 11:21, 12:1, 12:6, 12:16, 12:24, 13:12, 13:20, 13:25, 14:5, 14:9, 14:18, 14:19, 16:21, 16:23, 17:17, 17:18, 18:10, 18:11, 19:9, 19:21, 20:17, 20:23, 22:2, 22:9, 23:17, 24:5, 24:14, 24:16, 25:13, 25:25, 26:7, 26:24, 27:6, 27:12, 27:18, 27:24, 28:23, 29:3, 29:4, 29:9, 29:12, 29:21, 29:24, 30:3, 30:21, 31:5, 32:21, 33:16, 34:19, 35:1, 35:7, 35:8, 36:12, 36:13, 36:16, 37:8, 37:13, 37:16, 37:18, 37:19, 39:1, 40:25, 42:15

THOMAS [1] - 3:1

Thomas [1] - 4:22

those [18] - 6:10, 9:9, 13:17, 16:11, 16:15, 17:4, 17:8, 18:4, 18:7, 21:11, 26:17, 27:19, 28:9, 28:18, 28:20, 30:25,

33:1, 36:5

thought [1] - 29:16

threat [1] - 7:13

three [5] - 30:19, 30:20, 32:13, 37:4, 37:14

three-week [1] - 30:19

through [19] - 7:21, 16:24, 16:25, 19:9, 28:18, 29:1, 30:10, 31:2, 32:3, 35:5, 35:22, 36:3, 39:9, 39:11, 39:12, 41:2, 41:8, 41:9, 42:1

throughout [4] - 8:19, 19:2, 28:11, 38:22

thumb [3] - 33:24, 33:25, 34:7

Thursday [1] - 30:11

tied [1] - 11:5

time [23] - 17:1, 19:2, 26:8, 28:2, 28:3, 28:4, 28:8, 29:11, 29:21, 29:24, 30:25, 32:2, 32:4, 32:7, 37:7, 37:15, 37:20, 41:8, 41:19, 42:1

timely [1] - 14:2

times [1] - 37:18

to [261] - 4:2, 5:14, 5:16, 5:17, 5:22, 5:25, 6:14, 6:18, 6:22, 6:25, 7:4, 7:6, 7:7, 7:8, 7:10, 7:11, 7:16, 7:19, 7:20, 7:21, 7:23, 8:1, 8:5, 8:15, 8:24, 9:1, 9:2, 9:3, 9:4, 9:5, 9:9, 9:14, 9:17, 9:19, 9:21, 9:23, 10:2, 10:3, 10:5, 10:7, 10:10, 10:20, 10:24, 10:25, 11:1, 11:2, 11:10, 11:17, 11:21, 11:22, 11:23, 12:1, 12:2, 12:7, 12:15, 12:21, 12:23, 12:24, 13:4, 13:8, 13:11, 13:14, 13:16, 13:20, 13:22, 14:3, 14:6, 14:11, 14:12, 15:3, 15:6, 15:14, 15:19, 15:25, 16:4, 16:9, 16:12, 16:14, 16:15, 16:17, 16:19, 16:22, 17:8, 17:13, 17:15, 17:16, 17:22, 17:23, 17:24, 18:1, 18:5, 18:6, 18:21, 19:4, 19:8, 19:25, 20:8, 20:13, 20:17, 20:19, 20:20, 20:24, 21:4, 21:8, 21:14, 21:18, 21:23, 21:24, 21:25, 22:8, 22:10, 22:11, 22:18, 22:19, 23:8, 23:10, 23:16, 23:17, 23:19, 24:3, 24:6, 24:8, 24:11, 24:16, 24:23, 24:24, 25:2, 25:17, 25:18, 25:19, 25:23, 25:25, 26:1, 26:9, 26:10, 26:18, 27:1, 27:7, 27:8, 27:10, 27:18, 28:3, 28:5, 28:8, 28:11, 28:14, 28:15, 28:20, 28:23, 28:24, 29:1, 29:4, 29:8, 29:11, 29:12, 29:16, 29:21, 29:22, 29:24, 29:25, 30:2, 30:6, 30:7, 30:8, 30:12, 30:16, 30:18, 30:19, 30:21, 30:22, 31:1, 31:7, 31:11, 31:12, 31:21, 32:2, 32:7, 32:10, 32:13, 32:17, 32:25, 33:20, 33:21, 33:25, 34:4, 34:7, 34:23, 34:24, 35:2, 35:3, 35:7, 35:8, 35:14, 35:17, 35:19, 35:22, 35:23, 36:1, 36:3, 36:10, 36:20, 36:21, 36:22, 37:4, 37:8, 37:21, 37:24, 38:1, 38:11, 38:14, 38:16, 39:2, 39:3, 41:5, 41:8, 41:18, 41:21, 41:22, 41:25, 42:1, 42:21

today [4] - 5:15, 8:8, 31:10, 31:11

today's [1] - 20:25

together [2] - 11:6, 24:8
told [1] - 41:19
tooth [1] - 7:24
top [1] - 13:25
total [1] - 31:23
totally [1] - 9:20
touching [1] - 23:12
trade [1] - 9:9
transcript [2] - 1:25, 42:21
TRANSCRIPT [1] - 1:10
tremendous [1] - 7:19
tremendously [1] - 10:19
trial [67] - 5:13, 7:1, 7:2, 7:15, 7:21, 7:25, 8:3, 10:9, 10:20, 11:2, 11:4, 11:10, 12:7, 12:10, 12:19, 13:16, 13:20, 14:2, 14:4, 14:6, 14:11, 18:1, 21:2, 21:5, 21:13, 22:6, 22:8, 22:20, 23:5, 23:6, 23:13, 23:21, 23:23, 24:18, 24:25, 25:7, 25:18, 27:12, 28:11, 28:24, 30:14, 30:17, 30:19, 30:24, 31:1, 32:2, 32:4, 32:13, 33:6, 33:14, 33:20, 34:16, 34:20, 34:21, 35:7, 35:21, 36:8, 36:24, 37:2, 37:6, 37:25, 38:23, 41:6, 41:21, 41:23
trials [5] - 21:11, 21:12, 25:16, 36:21, 38:15
tried [11] - 6:4, 22:3, 22:18, 27:10, 28:10, 29:9, 30:9, 31:17, 38:1, 41:21, 41:24
tries [1] - 30:3
trip [2] - 35:4, 35:8
true [2] - 24:14, 42:21
truth [1] - 14:10
try [7] - 7:7, 21:25, 24:8, 27:22, 29:21, 29:24, 30:10
trying [6] - 8:24, 21:23, 27:8, 31:5, 32:2, 34:4
turn [1] - 16:19
turned [1] - 13:14
turns [1] - 34:3
Tuttle [4] - 4:4, 4:8, 11:19, 15:20
TUTTLE [2] - 1:4, 1:16
Tuttles [1] - 33:4
twice [1] - 26:18
two [24] - 10:15, 12:9, 12:12, 13:10, 13:17, 13:20, 21:11, 21:12, 25:12, 25:16, 25:25, 26:17, 28:15, 30:8, 32:1, 32:7, 32:10, 33:1, 35:13, 37:13, 38:11, 39:9, 40:6
TX [1] - 2:10
type [1] - 36:14
typically [2] - 33:19, 39:18

U

ultimately [1] - 21:1
unaware [1] - 9:20
under [1] - 7:13
underlying [1] - 22:12
underpinning [1] - 8:2
undersold [1] - 28:1

understand [9] - 5:14, 8:1, 8:5, 18:8, 28:17, 31:16, 38:17, 38:19, 40:25
understanding [3] - 5:16, 29:25, 42:22
understood [3] - 15:16, 34:12, 40:7
United [2] - 3:9, 42:20
UNITED [2] - 1:1, 1:11
unlinking [1] - 27:5
unreasonable [1] - 22:23
untangle [1] - 27:11
until [4] - 9:24, 16:22, 17:13, 34:21
unusual [1] - 7:6
up [14] - 5:23, 6:14, 8:25, 10:24, 13:16, 20:24, 30:14, 30:19, 32:1, 32:25, 33:23, 33:25, 34:1, 36:11
upon [5] - 20:7, 23:14, 28:22, 41:4, 41:25
us [12] - 10:1, 10:19, 10:22, 10:24, 10:25, 13:15, 17:25, 25:23, 35:11, 35:14, 37:11
use [3] - 22:23, 22:24, 29:23
using [1] - 29:8

V

versus [3] - 4:4, 26:23, 28:2
very [25] - 5:7, 9:2, 9:18, 10:11, 11:7, 12:4, 12:14, 12:24, 13:10, 13:19, 21:1, 21:13, 26:13, 27:24, 27:25, 28:5, 29:4, 29:5, 30:2, 33:7, 38:24, 39:14, 39:25, 40:11, 40:22
via [1] - 1:25
video [1] - 26:15
videos [3] - 31:23, 32:7, 32:9
view [2] - 12:20, 17:17
Vinny [1] - 37:22
violation [6] - 22:12, 22:16, 22:24, 23:9, 24:12, 25:9
voir [3] - 24:16, 31:22, 34:21
VS [1] - 1:5

W

waiting [1] - 18:8
waive [1] - 10:10
waived [1] - 10:6
walk [1] - 19:9
want [14] - 7:2, 7:8, 9:7, 12:15, 13:11, 14:6, 20:17, 21:18, 32:17, 33:20, 35:8, 35:19, 38:22, 41:20
wanted [9] - 5:15, 5:22, 8:15, 9:18, 9:20, 13:15, 16:17, 35:23, 36:21
WARE [1] - 1:17
warrant [6] - 22:17, 23:5, 24:2, 24:25, 25:4, 27:19
warrants [1] - 23:17
was [26] - 5:8, 5:13, 6:6, 7:25, 8:6, 9:24, 10:7, 10:12, 15:3, 16:21, 17:12, 21:2, 22:13, 22:16, 22:22, 22:23, 23:9, 23:12, 23:13, 25:21, 38:1, 38:2, 38:3, 38:4

wasn't [2] - 38:5
way [24] - 9:7, 10:18, 10:21, 11:2, 13:24, 14:17, 14:18, 17:12, 19:21, 21:15, 24:7, 25:7, 26:10, 27:7, 27:14, 27:24, 29:22, 30:11, 34:7, 36:6, 36:16, 36:17, 37:13, 37:23
we [53] - 5:18, 6:20, 7:7, 7:9, 7:18, 9:1, 9:17, 9:18, 9:22, 9:23, 10:4, 10:10, 10:11, 10:25, 12:18, 14:3, 14:6, 14:20, 17:24, 18:1, 18:16, 18:18, 18:21, 18:25, 19:3, 19:15, 21:1, 21:13, 23:6, 23:19, 23:21, 26:14, 26:18, 27:4, 28:8, 29:7, 29:9, 29:16, 31:3, 31:10, 31:21, 31:24, 32:7, 35:10, 35:17, 35:20, 36:3, 36:12, 37:10, 37:11, 38:21, 41:24
we'd [1] - 11:1
we'll [7] - 14:9, 14:22, 26:8, 26:12, 34:13, 36:2
We're [1] - 7:16
we're [26] - 8:7, 8:24, 10:2, 10:3, 10:4, 10:6, 15:14, 15:24, 21:24, 24:16, 25:23, 26:15, 28:5, 28:8, 28:12, 28:18, 28:20, 29:19, 30:23, 31:6, 31:7, 36:24, 41:3
we've [5] - 7:13, 9:20, 23:20, 24:4, 33:16
week [3] - 30:16, 30:17, 30:19
weeks [9] - 5:10, 25:25, 26:1, 26:16, 28:20, 32:1, 32:13, 34:16, 37:5
well [21] - 5:7, 5:10, 5:23, 7:8, 11:7, 18:10, 19:21, 25:6, 25:12, 26:25, 27:25, 28:15, 28:21, 37:18, 38:24, 39:14, 39:17, 39:25, 40:11, 40:22, 41:11
went [1] - 11:5
were [18] - 5:15, 6:5, 6:7, 9:8, 9:10, 9:20, 15:23, 16:13, 18:8, 21:5, 22:10, 22:19, 24:18, 24:24, 25:2, 27:5, 29:16, 42:17
what [41] - 6:25, 8:15, 9:1, 10:13, 11:18, 13:15, 13:16, 16:14, 17:15, 18:2, 20:19, 21:6, 21:23, 22:2, 22:21, 23:6, 23:12, 25:10, 25:24, 26:12, 28:3, 28:22, 29:8, 29:11, 29:14, 29:19, 30:2, 30:4, 31:1, 31:7, 32:22, 33:19, 35:17, 35:19, 37:23, 38:1, 38:6, 38:19, 40:24, 41:2
what's [4] - 5:9, 13:25, 18:1, 38:1
whatever [5] - 15:2, 28:6, 28:7, 28:15, 35:11
when [8] - 11:19, 18:22, 23:19, 25:21, 27:20, 28:2, 35:3, 41:1
whenever [1] - 22:2
where [5] - 7:25, 23:24, 31:7, 31:25, 38:14
whether [10] - 7:18, 14:11, 14:12, 20:8, 22:13, 23:7, 23:9, 27:12, 38:2, 38:3
which [26] - 5:21, 11:20, 12:13, 12:24, 14:4, 15:1, 15:4, 20:15, 20:16, 21:2, 21:17, 21:20, 23:17, 26:15, 28:25, 29:9, 29:10, 32:2, 35:4, 35:5, 36:24, 37:2, 37:15, 38:3
while [2] - 10:16, 26:21

who ^[12] - 6:10, 6:11, 6:20, 6:21, 7:17, 12:16, 12:22, 17:4, 17:9, 18:4, 18:20, 28:10
who's ^[2] - 7:12, 7:20
whole ^[1] - 24:15
whose ^[1] - 10:15
why ^[6] - 5:22, 9:23, 18:24, 19:3, 29:7, 38:22
will ^[21] - 6:3, 6:8, 8:20, 8:25, 9:2, 11:9, 13:3, 13:4, 14:19, 18:7, 20:21, 22:3, 25:17, 26:16, 28:4, 28:9, 28:25, 29:10, 38:12, 39:2
willing ^[2] - 15:3, 26:9
willingly ^[1] - 34:23
with ^[41] - 6:16, 9:19, 10:11, 11:20, 11:21, 12:1, 12:19, 12:23, 13:13, 14:16, 15:12, 16:12, 18:16, 21:15, 21:21, 22:16, 22:24, 23:10, 24:11, 27:15, 27:18, 28:10, 28:23, 29:7, 29:13, 30:10, 30:13, 30:25, 31:9, 31:14, 32:1, 32:6, 33:6, 34:9, 34:13, 35:11, 36:22, 39:23, 40:17, 41:19
within ^[3] - 18:5, 25:14, 26:21
without ^[3] - 20:17, 22:5, 27:22
witness ^[4] - 26:14, 32:6, 35:15, 36:12
witnesses ^[5] - 22:8, 23:1, 26:15, 31:23, 31:24
woefully ^[1] - 37:8
wondering ^[1] - 5:9
Wood ^[1] - 4:22
WOOD ^[1] - 3:1
word ^[1] - 19:16
worded ^[1] - 17:12
work ^[4] - 25:7, 29:1, 41:8, 42:1
working ^[1] - 28:18
worried ^[1] - 14:22
would ^[40] - 9:22, 15:1, 15:3, 15:4, 15:12, 17:23, 18:2, 21:4, 21:7, 21:15, 21:20, 22:19, 22:21, 23:4, 23:5, 24:2, 25:2, 25:3, 25:7, 25:8, 25:9, 26:11, 26:12, 26:18, 26:22, 30:17, 31:25, 32:1, 32:5, 32:9, 32:11, 32:20, 33:10, 33:13, 34:8, 34:16, 35:12, 39:15
wrong ^[1] - 26:12

Y

yeah ^[3] - 11:13, 14:6, 35:25
year ^[3] - 12:9, 35:1, 36:21
years ^[4] - 27:6, 27:7, 35:2, 38:22
yes ^[13] - 7:3, 15:19, 19:7, 19:23, 20:6, 20:10, 31:15, 33:8, 33:15, 34:2, 34:6, 36:5, 39:18
yet ^[7] - 5:18, 7:13, 7:18, 8:6, 20:19, 21:22, 29:20
you ^[143] - 4:3, 5:7, 6:25, 7:2, 7:9, 7:15, 7:17, 7:24, 8:9, 9:11, 9:12, 10:1, 10:3, 10:5, 10:24, 10:25, 11:3, 11:7, 11:8, 12:13, 12:15, 13:21, 13:23, 14:6, 14:24, 15:1, 15:3, 15:12, 15:16, 15:17, 16:1,

16:18, 17:3, 17:14, 17:17, 17:22, 18:3, 18:6, 18:8, 18:23, 19:8, 19:10, 19:13, 19:18, 19:25, 20:1, 20:4, 20:8, 20:9, 20:12, 20:19, 20:20, 21:10, 21:14, 21:15, 21:18, 21:21, 22:10, 22:12, 22:19, 22:21, 23:4, 23:22, 24:8, 24:20, 24:21, 24:23, 24:24, 24:25, 25:2, 25:13, 25:17, 26:3, 26:8, 27:11, 27:12, 27:14, 27:15, 27:16, 27:20, 28:3, 28:4, 28:9, 28:10, 28:14, 28:15, 28:24, 29:6, 29:20, 30:6, 30:9, 30:12, 30:19, 31:1, 31:7, 31:11, 31:13, 31:18, 32:12, 32:16, 32:25, 33:2, 33:20, 34:9, 34:12, 34:14, 34:24, 35:2, 35:6, 35:9, 35:12, 35:19, 36:5, 36:8, 36:15, 36:18, 36:22, 37:11, 37:21, 37:22, 38:2, 38:8, 38:11, 38:12, 38:25, 39:18, 39:19, 40:25, 41:1, 41:18, 41:20, 42:15
you're ^[22] - 5:9, 10:8, 18:5, 19:24, 19:25, 21:22, 22:6, 27:7, 28:2, 29:4, 30:16, 30:18, 30:19, 32:12, 32:19, 32:22, 34:3, 35:3, 38:13, 38:19, 41:5, 42:16
you've ^[1] - 33:1
your ^[36] - 4:6, 4:17, 6:24, 8:1, 8:2, 11:2, 12:21, 17:14, 17:17, 18:5, 18:7, 19:18, 20:21, 20:23, 20:24, 21:22, 25:13, 25:17, 26:21, 28:7, 28:24, 30:4, 30:6, 31:18, 33:9, 33:10, 33:13, 35:24, 36:17, 40:24, 41:4, 41:12, 41:18, 42:15
Your ^[40] - 4:7, 4:9, 4:13, 4:14, 8:12, 9:12, 9:15, 11:14, 15:19, 16:2, 16:4, 17:20, 18:13, 18:16, 19:23, 20:6, 20:10, 22:1, 24:4, 25:8, 25:22, 31:15, 32:24, 33:4, 33:7, 34:12, 34:15, 35:6, 36:18, 38:17, 39:6, 40:2, 42:6, 42:8, 42:9, 42:10, 42:11, 42:12, 42:13, 42:14
yourself ^[1] - 6:17